Supreme Court, U.S.
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No. 08-407

In the

Supreme Court of the United States

NANCY H. ROBERTS,

Petitioner,

v.

ANTHONY J. PRINCIPI, SECRETARY OF U.S. DEPARTMENT OF VETERANS AFFAIRS, U.S. DEPARTMENT OF VETERANS AFFAIRS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the VA, as a Title VII employer, be given the benefit of a "business reason" to justify its retaliatory job actions in 2001 and 2002 after it had officially investigated, considered, and rejected that same reason in 2002?

2. Does the VA's 2002 official investigation which had expressly excluded and omitted any consideration of the circumstances which demonstrated the causal effect of its Operating Room staff's retaliatory animus upon the VA's decision-maker constitute an "independent investigation" which breaks the imputed animus causal nexus and exonerates the VA from Title VII liability for its have initially removed the Petitioner from her Certified Registered Nurse Anesthetist position in 2001 then kept her out of the VA' surgical services.

3. Does the Court of Appeals' misreading of the issues and argument clearly stated by the Petitioner in her Appellant's Brief and the Court's then distinguishing between a "temporary transfer" and a "permanent reassignment" to justify its denying the Petitioner any relief for her initial June 27, 2001 thirteen-month retaliatory job transfer/reassignment call for this Court to exercise its supervisory powers and review the Court of Appeals' decision.

4. Has the Court of Appeals complied with this Court's interpretation of Title VII law when it appears to have imposed the strictest evidentiary burden that the Petitioner had to prove that the imputed retaliatory animus of its Operating Room staff was the

"sole" cause of the VA's removing her from her CRNA position in the VA's surgical services.

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The opinion of the Court of Appeals for the Sixth Circuit on the merits, No. 06-6059, was issued on June 25, 2008 and is unreported. It is reproduced in as Appendix A at pp. 1a- 23a. The Memorandum Opinion and Judgment of the United States District Court for the Eastern District of Tennessee at Greeneville, No. 2-02-CV-186, were issued on August 16, 2006. The Opinion is unreported. It is reproduced in Appendix B, 24a-49a. The Judgment is reproduced at Appendix B, 50a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on June 24, 2008. This petition complies with the provisions of 28 U.S.C. §2101(c) and Supreme Court Rule 13.1. This Court has jurisdiction under the provisions of 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Title VII of the 1964 Civil Rights Act, as amended are codified at 42 U.S.C.A.§2000e-3:

§2000e-3. Other unlawful employment practices

(a) **Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.**

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

The District Court for the Eastern District of Tennessee at Greeneville exercised original jurisdiction of the Petitioner's claims for Title VII (*42 U.S.C. §2000e-3*) retaliatory employment actions pursuant to its *29 U.S.C.A. §1331* federal question diversity jurisdiction and *42 U.S.C. 2000e-16(c)* and *42 U.S.C.A. §2000e-5*. The Petitioner abandoned her age discrimination claims before trial and did not appeal the District Court's denial of her request for Freedom of Information Act attorney's fees [App. A, 11a].

The Sixth Circuit Court of Appeals deviated significantly from this Court's employment discrimination evidentiary requirements and burden of production requirements which have been established by *McDonnell Douglas Corp. V. Green, 411*

U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and its progeny. The appeals court allowed the District Court to generate a "business reason" for the VA's removing the plaintiff from her Certified Registered Nurse Anesthetist (CRNA) position in June 2001 which the Veteran's Administration had considered and rejected in 2002 after its Administrative Investigative Board (AIB) had conducted an investigation into the alleged reasons for the plaintiff's removal.

The Petitioner's retaliation case is based upon the imputed animus analysis of Title VII liability which this Court has recognized in *Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).* The District Court refused to apply the imputed animus analysis to the undisiputed facts presented at trial because it concluded that Dr. Louis Cancellaro, the VA's decision-maker, had no personal retaliatory animus when he reacted quickly to the anti-Roberts petitions by removing the Mrs. Roberts from her CRNA position on June 27, 2001 [App. B, 35a and 42a] and that the retaliatory animus of the OR staff who authored and signed the anti-Roberts petitions was "largely irrelevant" [App. B, 40a].

The Court of Appeals opinion acknowledged that imputed animus could support Title VII liability but affirmed the judgment of the District Court because the VA's decision-maker had conducted an "independent" AIB investigation [App. A, 2a]. The Court of Appeals classified the animosity and ill-will which the Petitioner's EEO charges had engendered among some of the VA's surgical service staff as "personality conflicts" [App. A, 21a]. The appeals court

did not recognize the significance of the AIB's conclusion that the petitions' anti-Roberts accusations could not support the VA's having removed Mrs. Roberts from her CRNA position.

The District Court and the Sixth Circuit's opinions resurrected a "business reason" for the VA's retaliation which the VA itself had rejected and laid to rest in 2002. The Court of Appeals approved the District Court's "retrying" the 2002 Administrative Investigative Board (AIB) investigation and its hearing the same evidence of the anti-Roberts accusations and rumors which the AIB had heard before concluding that the VA did not have any justification for removing Mrs. Roberts from her CRNA position [App. A, 8a-10a; App. B, 30a-35a].

The Court of Appeals misread and unfairly parsed the issues and argument which the Petitioner presented on appeal when it stated [App. A, 15a-16a] that the Petitioner had not raised her June 27, 2001 "temporary" transfer from the CRNA anesthesia unit to the VA's ER as a "separate" claim of retaliation. The Petitioner had insisted during trial and in her Appellant's Brief that the VA's initially removing her from her CRNA position was a retaliatory employment action.

Page 3 of the Appellant's Brief in the Court of Appeals [Appendix C, 51a.] described the two related issues in the appeal. Issue #1 addressed the VA's adverse employment action and the imputed-animus connection in the following terms:

1. The District Court erroneously failed to apply this Court's Title VII imputed discriminatory/retaliatory animus test to the undisputed material facts of Mrs. Roberts' case when it mistakenly concluded that the EEO-retaliatory animus of Nurse Manager Lori Hagen's supporters did not motivate the VA's decision to remove the plaintiff from her CRNA position.

Issue #2 addressed the District Court's erroneous conclusion that the retaliatory anti-Roberts personal and professional accusations were "compelling non-discriminatory reasons" which exonerated the VA from Title VII liability even though the VA's AIB investigation had determined in 2002 that the same accusations did not justify the transfer [App. C, 51a].

The Court of Appeals acknowledged that Dr. Cancellaro's testimony confirmed that he ". . . relied principally, if not solely, on the petitions . . ." when he "temporarily" transferred Mrs. Roberts to the emergency room [App. A, 15a]. The Court of Appeals then parsed Mrs. Robert's nomenclature in order to conclude that she had not challenged the retaliatory nature of her June 27 "temporary transfer" in her briefs.

Contrary to the Court of Appeals findings and comments in footnote 3 at App. A, pages 15a-16a, Mrs. Roberts specifically stated in her Appellant's argument that the VA violated Title VII when it immediately removed her from her CRNA position in response to the retaliatory animus expressed in the three June 12-14, 2001 anti-Roberts petitions. When the Court of

Appeals announced that Mrs. Roberts had ". . . not claimed in her briefs that this temporary transfer, in and of itself, constituted a violation of Title VII[.]"[App. A, 15a] it must have overlooked the following language of Mrs. Roberts' first argument at page 41 of her Appellant's Brief [App. N, 189a]:

ARGUMENT

The VA's Removing Nancy Roberts From Her CRNA Position In The OR Constitutes Title VII Retaliation.

> The concerted retaliatory efforts of friends and supporters of Lori Hagen which convinced the VA to remove the plaintiff from her CRNA position within days of their learning that Mrs. Roberts had filed EEO charges against the OR's popular Nurse Manager violated Title VII of the 1964 Civil Rights Act, codified at *42 U.S.C.A. §2000e-3*. . . . .

The VA's removing Mrs. Roberts from her CRNA position on June 27, 2001 has always been one of the plaintiff's Title VII retaliation claims. Yes, the initial removal was the first of several continuing adverse employment actions, but the Petitioner did insist that the initial removal was, in and of itself, retaliatory. The June 27 removal was the first in a series of retaliatory employment actions which have exiled Mrs. Roberts from the VA's surgical services and have precluded her from practicing 85% of her CRNA skills.

Mrs. Roberts was 57 years of age at the time of the trial and had been employed since 1996 at the

Veterans Administration's James H. Quillen Medical Center in Johnson City, Tennessee. Before her retaliatory transfer, Mrs. Roberts performed general nurse anesthetist duties in the VA's surgical services unit including patient work-ups, monitoring, ordering special tests, consulting with physicians, intubating, extubating and anesthetizing patients with anesthetic blocks, spinals, epidurals, regionals, and general anesthesia and post-operative care. Since her retalitatorily transfer, Mrs. Roberts has been unable to practice 85% of her CRNA skills and has lost overtime-pay and on-call pay [App. M, 164a-166a].

The Petitioner's "imputed animus" theory of Title VII liability is premised upon the retaliatory outrage generated against Mrs. Roberts by Nurse Manager Lori Hagen's telling her staff on June 12, 2001 that she had just been told during a telephone call from a Washington state, VA- EEO counselor that Mrs. Roberts had filed EEO charges against her and that those charges were "the last straw" which had caused Hagen to resign her OR Nurse Manager position [App. D, 64a-65a and 70a-71a].

In fact, Lori Hagen had already interviewed for, and had accepted, the VA's Patient Safety Manager position on June 9, several days before she received the telephone call from the EEO counselor [App. D, 58a]. Hagen had not known before the EEO counselor's telephone call that Mrs. Roberts had filed EEO charges involving her in April 2001 [App. D. 61a-62a]. EEO counselor Barbara Walter telephoned Ms. Hagen on June 11 and the two ladies discussed the details of Mrs. Roberts' EEO charges [App. D., 59a-61a] Hagen thought the EEO counselor was in

Washington D.C. [App. D., 62a-63a] Counselor Walter did not tell Ms. Hagen to keep the details of the charges confidential [App. D, 54a]. Hagen discussed the EEO charges later in the day with Rubin Fuentes [App. D, p. 63a].

Lori Hagen admitted during her first day's trial testimony that she knew at the time she had given her staff the impression that Mrs. Roberts' EEO complaints were "the last straw" and that Mrs. Roberts was the "real reason" she was leaving her Nurse Manager's position in the OR [App. D, 70-71a]. Hagen equivocated during her second day's testimony as a VA witness, but admitted to the Court she had testified that she told her staff that Mrs. Roberts' EEO complaint was the "last straw" [App. D, 55a].

The Court of Appeals briefly described the plaintiff's January 2001 complaints of sex discrimination, lack of supervisory response, and some of the retaliatory activity which preceded Mrs. Roberts' filing her April 2001 "formal" EEO complaint which implicated several VA staff including Lori Hagen [App. A, 3a-4a].

Mrs. Roberts had been unsuccessful in having her complaints of sex discrimination against male CRNA Rubin Fuentes resolved informally by the VA's EEO office or by her direct supervisors. Fuentes had been using vulgar and demeaning epithets to refer to the female CRNAs and had posted a pornographic photograph on the wall of the anesthesia work room for everyone to see [App. A, 3a-4a; App. M, 168a-169a]. Nurse Manager Hagen had interjected herself into Mrs. Roberts' circumstances and had publicly blamed

her for the additional stress which Mrs. Roberts EEO-related complaints had allegedly caused Mrs. Roberts' supervisor, anesthesiology supervisor Clarence Goulding [App. M, 172a].

The three anti-Roberts petitions prompted the VA to abruptly transfer the plaintiff out of her CRNA position to the VA Emergency Room as a triage nurse on June 27, 2001. VA decision-maker Chief of Staff Louis Cancellaro testified that the petition prepared by Dr. Julie Dunn and signed by twelve surgeons was "disconcerting" because the "scuttlebutt" was that the surgeons ". . . would split the hospital[.]" [App. E, 75a]. Dr. Cancellaro worried that the VA's surgical services would be "decimated" if he did not act quickly to remove the plaintiff [App. E, 75a]. Dr. Cancellaro frankly admitted that he believed the accusations in the three anti-Roberts petitions were "sufficient to warrant" his transferring Mrs. Roberts out of the OR on June 27, 2001 [App. E, 76a].

Dr. Cancellaro stated that he believed that the "disruption" among the VA's surgeons had to be addressed immediately [App. E, 76a]. Dr. Cancellaro summarily reassigned Mrs. Roberts to the VA's emergency room without discussing the reasons for the transfer with her [App. M, 184a]. Mrs. Roberts was not aware at the time that the OR staff had circulated derogatory petitions against her [App A, 5a-6a; App. M, 184a].

Part-time VA surgeon Dr. Julie Dunn admitted that she was a friend of Lori Hagen and that she circulated her June 14-petition among the available VA surgeons. Dr. Dunn admitted that she wanted to

assist Ms. Hagen because Mrs. Roberts' charges had motivated Hagen to leave the OR. She said she authored her petition after Hagen told her that Mrs. Roberts' having filed a "hostile work environment" complaint against her was "the final straw" [App. F, 84a-85a].

The Dunn petition, signed by her and eleven other surgeons, [App. G, 110a-111a] stated in its first paragraph:

> **It has come to our attention that a complaint has been filed against Ms. Lori Hagen, OR Nurse Supervisor.** We are sending this letter in support of Ms. Hagen and feel the complaint is one of harassment.

The petition continued in its second paragraph:

> **Because of this incident, and other like it, Ms. Hagen has decided to leave our Service, much to our dismay . . . .**" [Emphasis supplied]

Rachel Weston's anti-Roberts CRNA petition [App. H, 112a-113a] referred to specific topics which Mrs. Roberts had included in her EEO charges. CRNA Weston had involved herself in the Title VII retaliatory conduct by displaying a vulgar and offensive note from Rubin Fuentes to Mrs. Roberts [App. M, 177a].

As VA Director. Dr. Carl Gerber knew that the "complaint" described in Dr. Dunn's surgeons petition was Mrs. Roberts' EEO charge. Dr. Gerber gave the

three anti-Roberts petitions to Chief of Staff Cancellaro to investigate but did not tell Dr. Cancellaro that the complaints referred to in the petitions were Mrs. Roberts EEO charges [App. A, 5a].

VA Director Gerber commissioned an internal Fact-Finding Committee which interviewed various employees, found fault with OR supervision, listed the personal and professional accusations which Hagen supporters made against Mrs. Roberts and recommended Mrs. Roberts be kept out of the OR [App. A, 6a].

When Dr. Dunn heard that Mrs. Roberts might be returning to her CRNA position in the OR, she generated a January 2, 2002 defamatory memo to Dr. Cancellaro which contained unsubstantiated and untrue accusations of alleged malpractice on the part of Mrs. Roberts. Dr. Dunn admitted that her derogatory memo to Dr. Cancellaro had contained unsubstatiated "reports" about Mrs. Roberts which she had heard from other OR staff members before she had generated her June 14, 2001 surgeons petition. [App. F, 92a-100a]. Dr. Dunn admitted that she intended to keep Mrs. Roberts out of the OR when she wrote the January 2002 derogatory memo [App. F, 105a]. Dr. Cancellaro recommended that the VA convene an Administrative Investigative Board (AIB) [App A, 6a].

The AIB was composed of two CRNAs and an administrative assistant from other VA institutions. It convened at the VA's Mountain Home Medical Center in March 2002 to investigate the petitions' accusations against Mrs. Roberts. The Petitioner was never given copies of the three derogatory petitions

[App. A, 22a; App. I, 124a-125a; App. M, 184a]. Mrs. Roberts answered the AIB's questions without knowing the substance of the accusations against her.

The AIB heard a multitude of personal and professional accusations and rumors against the plaintiff. But none of the accusations had ever been documented. The accusations had not surfaced before the June 2001 anti-Roberts petition drive. Mrs. Roberts had an unblemished personnel record [App. I, 122a]. The AIB concluded that the accusations against Mrs. Roberts were not substantial enough to justify the VA's having removed Mrs. Roberts from her CRNA position.

The AIB issued its report and recommendations on May 16, 2002 [App. I, 114a - 135a]. The AIB's description of the scope of its investigation in ¶2 of its report [App. I, 115a] confirmed that it followed Director Gerber's instruction to avoid considering the impact which Mrs. Roberts' EEO charges had on the OR staff supporters of Lori Hagen. The AIB's "scope" description also reflects that the various derogatory accusations and rumors which the AIB investigated had been generated in 2001 **after** the VA administrators had received the three anti-Roberts' petitions described in the report as "signed letters of complaint."

The pertinent "scope" provisions [App. I, 115a] are:

> . . . . This investigation was convened to inquire into the facts and circumstances regarding multiple allegations of improper behavior by a Certified Registered Nurse Anesthetist (CRNA)

> in repeated instances during 2001 in the OR suites. **Surgeons, nurse anesthetists, and OR nurses, signed letters of complaints and subsequent communications with the Chief of staff indicated that concerns subsequently existed that a hostile environment may have impacted patient care. . . . . The Medical Center Director has also requested that the AIB refrain from investigating alleged EEO complaints, which are being investigated separately, thus the alleged EEO complaint is not within the scope of the present investigation.** [Emphasis supplied].

The AIB interpreted Dr. Gerber's directive to preclude its investigating the causal connection between Lori Hagen's telling her OR staff on June 12, 2001 that Mrs. Roberts' EEO charges "were the last straw" and had caused her to resign her position as the OR Nurse Manager. Through Chairman Henry Talley, the AIB stopped Lori Hagen when she attempted to testify regarding her June 11, 2001 telephone conversation with the Washington D.C.- EEO counselor about Mrs. Roberts' EEO charges [App. D, 68a-69a]. The AIB's report does not contain any reference to Mrs. Roberts' EEO complaint after its discussion of the authorized "scope" of its investigation.

Mr. Roberts proved her *Title VII* retaliation case by the party-opponent admissions of the two VA decision-makers, Director Carl Gerber and Chief of Staff Louis Cancellaro, official VA documents, and the uncontradicted testimony of Lori Hagen and anti-

Roberts petitioners Dr. Julie Dunn and Dr. James W. Battle. The limited scope of the AIB investigation and the failure of the VA to inform Mrs. Roberts of the substance of the accusations prevented her from making any meaningful response and preclude the VA's relying on the AIB investigation to break the causal nexus between the OR staff's EEO- retaliatory animus, the anti-Roberts petitions, and Dr. Cancellaro's immediately moving Mrs. Roberts to the emergency room for thirteen months.

The AIB focused on the Hagen supporters' unsubstantiated accusations against Mrs. Roberts instead of on the connection between Mrs. Roberts' EEO activity, Lori Hagen's June 12 lie to the OR staff that Mrs. Roberts' EEO charges were "the final straw" which had caused her to resign her OR Nurse Manager position, the three derogatory OR petitions sent to the VA administrators, and the VA's transferring Mrs. Roberts from her CRNA position.

The AIB's "§4, FINDINGS OF FACT" [App. I, 117a] specifically described the **1) CRNA June 13-14, 2001 petition at ¶d, 2) the nursing staff petition "signed by 26 perioperative employees" at ¶e, and 3) Dr. Dunn's June 14, 2001 petition signed by 12 physicians which ". . . addressed problems surrounding the transfer of the nurse manager of the operating room, Lori Hagen," at ¶f** [App. I, 117a].

The AIB heard and summarized the numerous derogatory accusations which pro-Hagen supporters made against Mrs. Roberts [App. I, 119a-124a]. The AIB noted that none of the accusations had ever been

documented and that Mrs. Roberts had an unblemished personnel record [App. I, 124a] The AIB concluded that all the retaliatory accusations made against Mrs. Roberts, including ophthalmologist Janet Brown's accusations about alleged inadequate patient sedation, were not substantial enough to justify the VA's having removed Mrs. Roberts from her CRNA position. At "§5f. Conclusion 6 of its Report [App. I, 122a], the AIB concluded:

> Analysis. **Though these are performance issues, they are not issues that can easily substantiate removing Ms. Roberts from patient care and revoking her CRNA privileges. Additionally, there was no evidence that Ms. Roberts was ever counseled or reprimanded for these actions.**
>
> **There were few statements made that would indicate that Ms. Robert's [*sic*] clinical performance was in question. The only comment that was made was by Dr. Janet Brown who said that she had "problems with patients not being adequately sedated for procedures, particularly when Nancy Roberts was administering the sedation." Dr. Brown then went on to make the disturbing statement that she noted several complications of surgery that were caused by patient movement and inadequate sedation. When asked if she had reported these complications to anyone, she**

> **reported that she had not.** [Emphasis supplied].

The AIB concluded in "§5g. Conclusion 7 [App. I, 123a] that Mrs. Roberts should not return to the surgical services area but found that:

> . . . **there is nothing concrete and substantial to base this significant administrative disciplinary action upon.** However, for her to return would likely cause the downfall of Mountain Home's surgical program. The staff within the surgery area appeared to function as a dysfunctional family that is clearly divided into two sections, one that is supportive of Ms. Roberts (this is definitely the minority group) and one that does not want her to return.

In its "§5. RECOMMENDATIONS" [App. I, 124a], the AIB concluded that:

> **The AIB team could find no history of formal disciplinary action, counseling, etc. Additionally, Ms. Roberts was removed from patient care without her supervisor's advance knowledge and without Ms. Roberts being able to review the formal complaints made against her. (The AIB team thought it would have been prudent to share the petitions with the names involved, with Ms. Roberts as evidence supporting the detail.)**

> The AIB team unanimously agree that the reappointment to [*sic*] Ms. Roberts to the Anesthesia Service would be detrimental to the James H. Quillen VA medical Center surgery program **as many surgeons will reportedly resign and patient care could be compromised through the many distractions this would cause. We can find no regulations or actions that could support the revocation of Ms. Roberts' privileges as a CRNA. For Ms. Roberts to remain as a registered nurse in another service at CRNA pay is expensive but possibly worth the price for the facility.** Ms. Roberts indicated she wants to transfer to another VA facility, which should be facilitated, and would also be the best for all involved parties. **If a Human Resources Management Service (HRMS) specialist can find a way to legally support keeping Ms. Roberts from the surgery area, the AIB team would firmly support this action.** [Emphasis supplied]

Director Carl Gerber officially approved the AIB report on June 19, 2002, with his handwritten comment on the last page [App. I, 125a]: "**Concur with these recommendations.**" [Emphasis supplied].

Chief of Staff Cancellaro's July 16, 2002, first "Reassignment" memo to Mrs. Roberts [App. J, 136a-137a], provided an additional uncontradicted party-opponent admission that the retaliatory animus which motivated the three anti-Roberts petitions had

prompted the VA decision-maker to move the Mrs. Roberts out of her CRNA position.[1] The memo confirms that Dr. Cancellaro relied upon the June 2001 anti-Roberts petitions when he removed Mrs. Roberts from her CRNA position on June 27, 2001 and relied upon those same petitions and the 2002 AIB recommendations when he reassigned her to the GI Lab:

> 1. In June, 2001, the Medical Center Director received petitions signed by numerous employees from Surgical Service expressing their feelings of working in a hostile and stressful environment. . . . . Based on these petitions, a fact-finding board was convened to examine the facts surrounding allegations of improper behavior by you. You were detailed effected June 27, 2002, to a staff nurse position in the emergency room during the fact-finding.
>
> 2. . . . . To specifically address these allegations, an administrative board of investigation comprised of members from three separate VA facilities in VISN 9 were appointed. In the summary report of this board, a recommendation was made that you be placed in a position other than in Surgical Service.
>
> 3. Based on that recommendation, you are being reassigned to a staff nurse anesthetist (CRNA)

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[1] By the date of this reassignment memo, the Petitioner had been performing triage nursing duties in the ER for thirteen months and had not been allowed to practice any of her CRNA skills.

> position in Medical Service effective August 1, 2002. Attached is the scope of practice for this position [GI Lab].

The "Scope of Practice Statement" attached to the memo [App. J, 138a-140a] explains that Mrs. Roberts' CRNA duties are ". . . restrictive to IV conscious sedation under the supervision of the attending physician." Mrs. Roberts received excellent evaluations and was transferred to the Bronchoscopy Lab after the VA combined the GI Lab with its surgical services unit. She continues in the VA's employ though her ability to practice her anesthesia skills and duties have been reduced by 85% [App. M, 165a -167a and 187a].

The pertinent testimony of the significant VA actors which proved the Mrs. Roberts' *Title VII* which case was uncontradicted. Mrs. Roberts did deny the substance of the 2001 derogatory rumors and accusations about her - but those rumors and accusations had found by the AIB in 2002 to be too attenuated to justify Mrs. Roberts' being removed from her CRNA position.

Significant uncontradicted trial testimony which confirmed the "causal connection" was given by former VA general surgeon Dr. James W. Battle. Dr. Battle testified before the AIB in 2002, and then before the District Court in 2006. Dr. Battle testified that he signed Dr. Dunn's anti-Roberts petition because he and everyone else in the VA's surgical suite were "shocked" to learn that Mrs. Roberts had gone to the EEO in Washington, D.C. to complain about Lori Hagen. Dr. Battle testified that ". . . there was

considerable disruption when this happened." Dr. Battle told the AIB and the District Court that Mrs. Roberts' "action" against Ms. Hagen resulted in Hagen's resignation.[2] [App. K, 141a-149a; App. L, 152a, 156a]

Dr. Battle candidly testified that he "understood" when he signed Dr. Dunn's petition that Nancy Roberts' complaint was "the reason" that Hagen had resigned her OR Nurse Manager position [App. K, 145a]. The retired-surgeon explained that he had interacted with Mrs. Roberts in "about one-quarter of the major surgeries" he performed at the VA [App. K, 147a]. Dr. Battle had not seen, or experienced, any behavioral or professional problems with Mrs. Roberts [App. K, 142a-143a]. Dr. Battle liked the way Lori Hagen was running the O.R., but he had nothing personal against Ms. Roberts [App. K, 145a].

In response to the District Court's focused questioning, Dr. Battle testified that he would not have signed Dr. Dunn's petition against Mrs. Roberts if he had known that Mrs. Roberts' EEO complaint had nothing to do with Ms. Hagen's decision to take another job [App. K, 147a-148]. Dr. Battle had never witnessed any conflict between Mrs. Roberts and other OR staff [App. K, 148a].

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[2] The District Court's opinion did not mention Dr. Battle or his uncontradicted testimony. Although the Petitioner extensively briefed the significance of Dr. Battle's testimony as part of her imputed animus case, the Court of Appeals did not address the substance of the testimony and mentioned it briefly in passing [App. A, 21a].

Dr. Battle's testimony was uncontradicted and confirmed the nexus between Mrs. Roberts' EEO activity, Lori Hagen's June 12, 2001- lie about that EEO-activity to her OR staff, Dr. Dunn's June 14 anti-Roberts petition signed by eleven other surgeons [App. G, 110a-111a], and the VA's immediately removing Mrs. Roberts from her CRNA position. Neither the District Court nor the Court of Appeals explained why it disregarded Dr. Battle's clear and significant testimony.

The record reflects that Dr. Julie Dunn actually testified in detail about the retaliatory animus she bore Mrs. Roberts. The District Court and Court of Appeals referred to that portion of Dr. Dunn's testimony which described her biased opinion that Mrs. Roberts should be barred from the OR. [App. A., 9a; App. B. 32a-33a]. Dr. Dunn testified that she talked with Lori Hagen about Mrs. Roberts because she heard that Hagen was leaving the OR [App. F, 82a, 103a, and 107a]. Dr. Dunn generated her anti-Roberts petition after Lori Hagen told her that Nancy Roberts' having filed her "complaint" about a "hostile work environment" was "the final straw" [App. F, 82a-84a]. Lori Hagen described some of the specifics of Mrs. Roberts' EEO complaint to Dr. Dunn [App. F, 89a - 90a]. Dr. Dunn admitted that Mrs. Roberts had never been rude, impolite, or abusive to her or to anyone in her presence [App F. 86-87a].

Other surgeons also expressed their belief to Dr. Dunn that Mrs. Roberts' complaint was "the final straw" for Lori Hagen [App. F, 85a]. Dr. Dunn admitted that she blamed Nancy Roberts as the "real source of the problem" described in her petition and

that there was a "great deal of dismay" in the OR about Lori Hagen's announced resignation. Dr. Dunn's petition circulated only one day among the VA's surgeons before she sent it to Director Gerber [App. F, 87a].

The District Court and Court of Appeals both concluded that Dr. Dunn believed that Mrs. Roberts "disrupted the operating room" [App. A, 9a; App. B, 33a]. But Dr. Dunn also testified that her opinion was not based on anything she actually saw or documented [App. F, 108a - 109a]. In fact, Dr. Dunn testified that she had never actually seen Nancy Roberts be rude or abusive to any OR physician or staff employee and had never witnessed any "disruption" [App. F, 94a]. Dr. Dunn had never personally experienced any problems with Mrs. Roberts' competency or behavior [App. F, 94a]. Dr. Dunn testified that she had the authority as the assistant chief of surgery to officially report Nancy Roberts if she caused any problem in the OR Dr. Dunn never reported Mrs. Roberts for anything prior to learning of Roberts' EEO complaint against Lori Hagen [App. F, 108a -109a]. Dr. Dunn did not personally see any impact on patient care which she could attribute to Mrs. Roberts [App. F, 90a].

Dunn testified that she could not remember any rumors that Mrs. Roberts had been causing Lori Hagen any "problems" other than the complaint of the hostile work environment which had led Hagen to resign her position in the OR. Nothing "stood out" in Dr. Dunn's mind as being a "morale problem" in the OR when Nancy Roberts was a CRNA. Dr. Dunn did not personally observe any stress caused by Mrs. Roberts in the OR [App. F, 108a-109a].

Dr. Dunn admitted that the professional accusations she had made against the plaintiff in her January 2002 memo to Dr. Cancellaro contained unsubstantiated "reports' which she had heard from other OR staff [App. F, 93a-101a]. DR. Dunn admitted that she intended to keep Mrs. Roberts from returning to the OR when she wrote her January 2002 derogatory memo to Dr. Cancellaro [App. F, 105a] Neither the District Court nor the Court of Appeals credited Dr. Dunn's explanation that her extreme dislike for Mrs. Roberts sprang from the belief that Mrs. Roberts' EEO charges had forced Lori Hagen to leave her OR Nurse Manager position.

Only Dr. Dunn could testify about the retaliatory motivation behind her anti-Roberts' petition. She did so - but the District Court and Court of Appeals deviated from this Court's established *Title VII* evidentiary analysis framework and ignored the impact of Dr. Dunn's uncontradicted testimony which proved the Petitioner's imputed animus case.

During the 2006 trial of the case, the VA put on several witnesses who had been listed at the end of the AIB's report as having appeared before the AIB in 2002 [App. I, 131a-135a]. The VA witnesses gave sworn statements describing the same litany of unsubstantiated accusations which they had made to the AIB. Instead of following this Court's directive that a defendant employer must articulate a non-discriminatory business reason for its employment action, and, when challenged, offer admissible evidence of that reason, the District Court and the Court of Appeals gave credence to, and relied upon, the

same stale anti-Roberts accusations which the VA's AIB investigation had heard and rejected in 2002.

Dr. Janet Brown's unsubstantiated accusations that Mrs. Roberts had insufficiently anesthetized several patients appears to have impressed both the District Court [App. B, 33a] and the Court of Appeals [App. A, 10a] which considered the accusations to be "most damning." Both Courts erroneosly emphasized the "credibility" determination made by the District Court regarding Dr. Brown's testimony. Dr. Brown had made the same anti-Roberts accusations to the 2002 AIB. Those accusations had not impressed the professional AIB members who did not credit Brown's accusations as a valid reason to prevent Mrs. Roberts from practicing her CRNA duties. There has never been any legitimate "credibility" issue between Dr. Brown and Mrs. Roberts because the VA's AIB heard Dr. Brown's accusations during its 2002 investigation and concluded that they were too insubstantial to justify Mrs. Roberts' removal [App. I, 122a - 124a].

Dr. Brown's signature does not appear on Dr. Dunn's June 14, 2001- petition [App. G, 111a]. Dr. Brown's trial testimony could not, under Tile VII law, furnish a legitimate justification for the VA's having removed the Mrs. Roberts from her CRNA position on June 27, 2001 or for keeping her from returning to the OR.

Neither the District Court nor the Court of Appeals opinions explained why it considered Dr. Brown's testimony to be so significant to the *Title VII* liability issue. Neither court commented upon the AIB's

conclusion that Dr. Brown's accusations could not justify the plaintiff's removal from her CRNA position.[3]

REASONS FOR GRANTING THE PETITION

1. The Sixth Circuit Court of Appeals has decided an important issue of federal employment law in a manner which conflicts with this Court's *Title VII* decisions by enabling employers to resurrect alleged justifications for an employment action which the employer had officially rejected when, or shortly after, it took the action.

By adopting the VA's AIB report to justify its rejecting the plaintiff's *Title VII* imputed animus claim and then ignoring the significance of the AIB's conclusions that the anti-Roberts petitions, rumors, and accusations were not substantial enough to justify the VA's having removed Mrs. Roberts from her CRNA position, the Court of Appeals departed from this Court's established *Title VII* evidentiary requirements and burden-shifting paradigm announced in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)*; *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-253,*

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[3] The AIB recommended that the VA "review and address" the "case outcomes" for the ophthalmology department to determine if it had a "higher complication" rate than the other surgery specialties [App. I, 124a]. The VA never offered evidence that it made any follow-up investigation to determine the accuracy of Dr. Brown's tardily expressed complaints about Mrs. Roberts' performance as a CRNA. Apparently no VA administrator actually believed Dr. Brown's accusation.

101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); St. Mary's Honor Center v. Hicks. 509 U.S. 502, 505, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142-143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The Court of Appeals had decided an important federal employment law question in a way that conflicts with the requirements of the *42 U.S.C. §2000e-3* and the relevant decisions of this Court.

This Court's decisions require a *Title VII* victim to prove a causal connection between his/her protected EEO activity and retaliatory employment decisions. The employer must then "articulate" or "produce" a legitimate non-discriminatory reason or justification for its adverse employment action. *St. Mary's Honor Center v. Hicks, Id. at 506-507.*

The *Title VII* defendant employer must produce a "clear" "legitimate business reasons" for the adverse employment action so that the plaintiff employee can attack those reasons. Both the plaintiff's attack on the employer's articulated business reason and the employer's explanation of its business reason must be made with admissible evidence. *Burdine, 450 U.S. at 254, 101 S.Ct., at 1094,* quoted in *St. Mary's Honor Center v. Hicks, 509 U.S. at 507, 113 S.Ct. 2747.*

Mrs. Roberts has not attacked the findings of the AIB which conclude that the anti-Roberts petitions, rumors, and accusations were not "concrete" or "substantial" enough to justify the VA's transferring her out of the OR's anesthesia unit. Mrs. Roberts relied upon the AIB report to show that the VA had concluded in 2002 that the anti-Roberts petitions,

rumors, and accusations which were repeated at the 2006 *Title VII* trial were too "insubstantial" to justify the VA's having removed her from her CRNA position [App. I, 122a].

Under this Court's established employment discrimination decisions, the re-airing of personal and professional accusations against Mrs. Roberts at the trial of this case should have been an act of futility. The conclusions of the AIB left no issue of fact for the District Court to resolve regarding the legitimate "reason" for the plaintiff's transfer. There was no non-retaliatory reason.

Dr. Cancellaro reflected his reliance on the anti-Roberts petitions and the AIB's report in his July 16, 2002 reassignment memo [App. J, 136a]. In light of the VA's 2002 AIB's investigation and conclusions, which was officially "concurred in" by the VA's Director, there could not be any "legitimate business reason" to justify the VA's having removed Mrs. Roberts from her CRNA position after it received the June 13-14, 2001 retaliatory anti-Roberts petitions.

This Court has held that when a defendant-employer does not present admissible evidence of a legitimate non-discriminatory reason for its having taken a tangible employment action, the plaintiff-employee's uncontradicted evidence of discrimination and causation compels the entry of a judgment for the plaintiff as a matter of law. *St. Mary's Honor Center, Id., at 507.*

The Court of Appeals' opinion departs from, and conflicts with, this Court's relevant decisions when it

concludes the Petitioner failed to present sufficient evidence to "compel" a finding that Dr. Cancellaro had been "mere conduit" of the OR staff's retaliatory animus [App. A, 16a]. The appeals court found that "some" of the signatories to the anti-Roberts petitions acted against Mrs. Roberts "because of her EEO activity," that Dr. Dunn's surgeons petition and Weston's CRNAs petition specifically referred to Mrs. Roberts' "complaint" against Lori Hagen, and that it was "unlikely" that the anti-Roberts petitions would have been given to Dr. Cancellaro had not Lori Hagen indulged in her "outburst after being informed of the EEO charge" [App. A, 14a]. The Petitioner respectfully insists that the Sixth Circuit's somewhat abbreviated conclusion regarding the uncontradicted evidence that the OR staffs' retaliatory animus motivated Dr. Cancellaro to remove her from the OR leaves confirms that her *Title VII* rights were violated.

The District Court and the Court of Appeals' misuse of the AIB's 2002 report significantly alters the balance struck by this Court and gives defendant employers an almost insurmountable advantage in *Title VII* litigation. The Court of Appeals decision sanctions a District Court's embracing previously-rejected contentions as a current legitimate non-discriminatory reason for the employer's tangible employment action in order to exonerate the defendant-employer. The Court of Appeals decision permits district courts to exonerate an employer from *Title VII* retaliation liability on the basis of a "business reason" which the defendant employer has officially admitted it does not have.

The Sixth Circuit's conclusion that the Petitioner "conflates legal justification with causation" [App. A. 21a] confirms the appeals court's departure from the *McDonnell-Douglas-St. Mary's Honor Center's* evidentiary and burden of production requirements. Under this Court's decisions, the defendant employer must articulate a legal "justification" for its employment action. The plaintiff-employee must prove "causation."

"Justification," whether legal or illegal, relates to the defendant-employer's reason for its employment action. The VA admitted in its AIB report that it had no legal "justification" for its adverse employment action [App. I, 122a and 125a]. This Court's precedent and the AIB's findings preclude the VA's using, or the District Court's using, the OR staff's derogatory petitions, rumors, and accusations as a *Title VII* business "justification" for the VA's removing Mrs. Roberts from her CRNA position.

The Petitioner acknowledges that the continuing ill-will in the OR expressed by pro-Hagen supporters during the trial of this case may properly be considered by the courts in determining whether reinstatement or other equitable relief which should be afforded Mrs. Roberts. *Suggs v. Servicemaster Education Food Management, 72 F. 3d 1228, 1234 (6th Cir. 1996).* But the considerations which may be relevant to potential equitable remedies should not have been part of the initial determination of *Title VII* liability.

The Sixth Circuit's ruling effectively destroys this Court's *McDonnell Douglas - St. Mary's Honor Center*

evidentiary requirements and burden-shifting paradigm and should be reviewed by this Court.

2. The AIB's 2002 investigation cannot break the chain of imputed animus causation between the EEO-retaliatory anti-Roberts petitions and Dr. Cancellaro's removing Mrs. Roberts from her CRNA position.

The Sixth Circuit's opinion improperly concludes that the AIB's investigation insulates Dr. Cancellaro from the imputation of the OR staff's retaliatory animus. But the AIB's investigation actually confirmed that the VA had no "legitimate business reason" to have transferred Mrs. Roberts in the first place.

The circumstances which establish the retaliatory causation are:

1) Nancy Roberts' 2001 EEO activity,

2)Lori Hagen's learning on June 11, 2001 that she had been implicated in Mrs. Roberts' EEO complaint;

3) Lori Hagen's June 12- lie to her OR staff that Mrs. Roberts' EEO charge was "the last straw," and had forced her to resign her OR Nurse Manager position;

4) the generation and circulation of three anti-Roberts petitions by pro-Hagen supporters in the OR who believed that Mrs. Roberts EEO charges had forced Lori Hagen to resign;

5) Dr. Julie Dunn's June 14 anti-Roberts petition which she generated and circulated among VA surgeons because she believed Nancy Roberts' EEO complaint "was the last straw" which forced Lori Hagen to resign her OR Nurse Manager position; and

6) Chief of Staff Louis Cancellaro's abruptly removing Mrs. Roberts from her CRNA position on the basis of the contents of the anti-Roberts petitions which caused him to believe that the petitioning surgeons would "split the hospital" and "decimate" the VA's surgical services.

The AIB's investigation does not break imputed animus nexus between the retaliatory pro-Hagen supporters and the VA Chief of Staff's employment decision because:

1) the AIB report exonerated Mrs. Roberts "on the merits" from the litany of derogatory accusations and concluded that the VA had no legitimate reason to remove her from the OR;

2) following what it interpreted as the instructions from the VA Director, the AIB avoided any consideration of the impact which Lori Hagen's lie about Mrs. Roberts' EEO charges had upon the OR staff who had generated and signed the anti-Roberts petitions and who were giving sworn statements against Mrs. Roberts during the VA proceedings;

3) the VA failed to inform Mrs. Roberts of the accusations against her;[4] and

4) the AIB issued its report in May 2002 and the VA's Director concurred in the AIB's conclusions and recommendations in June 2002, nearly a year after the VA had summarily and retaliatorily removed Mrs. Roberts from her CRNA position.

The VA's AIB investigation may have initially been conceived as an "independent investigation." But the VA's restricting the scope of the investigation had the operational effect of preventing the AIB from hearing and considering facts which showed the retaliatory basis for the anti-Roberts' petitions and accusations and prevented Mrs. Roberts from being able to "tell her side." As a matter of law, the AIB's failure to hear and consider critical evidence of EEO retaliation and the VA's refusal to inform Mrs. Roberts of the accusations against her preclude the VA from relying upon the AIB's investigation as an "intervening factor" which can insulate it from *Title VII* liability.

This Court has approved the use of circumstantial evidence of "imputed animus" to support a finding of

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[4] Even though the VA did not inform Mrs. Roberts of the accusations against her and thereby prejudiced to ability to "tell her side," the AIB found that the rumors and accusations did not justify her being removed from her CRNA position. But the AIB's investigation did not comport with the basic tenet of an "independent investigation" that the employee be allowed to tell his/her side of the circumstances which allegedly led to the employment action. *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles, Id., at 488.*

age discrimination against an employer. *Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 153 (2000).* The Sixth Circuit Court of Appeals confirmed that an "imputed animus" or a "cat's paw" analysis of evidence of subordinate employees' discriminatory motives is appropriate when that discriminatory animus may have caused the actual decision-maker to take an tangible employment action against the individual who is the object of the discriminatory animus.

The Sixth Circuit's opinion referred to *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476 (10th Cir. 2006, cert, granted, — U.S., —, 127 S.Ct. 852, 166 L.Ed.2d 681,* and *dismissed — U.S. —, 127 S.Ct. 1931, 167 L.Ed.2d 583 (2007)* [App A, 16a-17a] which summarized the variations of the imputed animus analysis of subordinate employees' *Title VII* bias and recognized that of an employer's having conducted an intervening independent investigation can exonerate the employer from *Title VII* liability.

The uncontradicted testimony of the VA decision-maker and the uncontradicted testimony of the anti-Roberts' petition signers proved Mrs. Roberts' *Title VII* retaliation claims. The AIB's investigation and the concurrence of the VA's Director occurred in May and June 2002, nearly a year after Dr. Cancellaro had reacted on June 27, 2001 to the retaliatory anti-Roberts petitions by summarily removing Mrs. Roberts from her CRNA position. The significant time lapse renders the AIB recommendations insufficient to break the retaliatory nexus.

3. The Court of Appeals overlooked pertinent argument sections of Nancy Roberts' Appellant's Brief, mistakenly found that Mrs. Roberts had not argued that her initial June 27, 2001 removal as a CRNA was, "in and of itself," retaliation, and thereby denied the Petitioner judicial due process.

The opinion of the Court of Appeals states that "Dr. Cancellaro's testimony confirms that he relied principally, if not solely, on the petitions . . ." when he "temporarily transferred" Mrs. Roberts to the VA's emergency room. The Court of Appeals then announced that Mrs. Roberts had not claimed in her briefs that the temporary transfer, "in and of itself, constituted a violation of *Title VII*" [App. A, 15a]. At footnote 3 [App. 16a] the Court commented on its not considering issues raised for the first time on oral argument by "quick thinking counsel."

As pointed out in this Petition's Statement of the Case, the appeals is obviously mistaken. The Petitioner raised the retaliatory nature of the initial June 27, 2001 removal as an independent retaliation claim in her appellant's brief [App. C, 51a and App. N, 189-190a] **and** discussed the claim during oral argument.

The District Court's opinion did refer to the VA's categorization of the initial transfer as a "temporary detail which was "not punitive" [App. B, 29a]. But the Court's description connotes an acceptance of the VA's defensive legal position and appears to adopt an interpretation of *Title VII* retaliation law which was clearly altered by this Court in *Burlington Northern &*

Santa Fe Railway Co. v. White, 548 U.S. 53, 69-71, 126 S.Ct. 2405, 165 L.Ed. 2d 345 (2006).

Mrs. Roberts June 27, 2001 reassignment to the ER as a triage nurse where she could not practice her anesthesia skills and lost overtime pay and on-call pay opportunities was certainly a significant retaliatory action which would discourage or deter any VA employee from subsequently filing EEO discrimination/retaliation charges. Mrs. Roberts proved that her initial transfer to the Emergency Room, whether temporary or not under VA internal policies, violated *Title VII*'s retaliation prohibitions.

The Court of Appeals utilized the phrase "temporary transfer" to describe Mrs. Robert's June 27, 2001 initial removal from her CRNA position. The appeals court then distinguished Mrs. Roberts' June 27, 2001 removal from her post AIB-report 2002 "permanent reassignment" to the GI Lab The excerpt from the Appellant's Brief [App. N, 189a-190aa] shows that Mrs. Roberts clearly raised the issue of the retaliatory nature of her June 27, 2001 removal from her CRNA position and cited the Court to the recently announced *Burlington Northern & Santa Fe Railway Co. v. White, supra.*

The Court of Appeals' egregious mistake prevented its fairly considering Mrs. Roberts' June 27, 2001 retaliatory removal claim and rises to the level of a judicial denial of due process. The Petitioner submits that the Court of Appeals significant mistake so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. The Petitioner respectfully

submits that the interests of justice require that the Court of Appeals' oversight be corrected.

4. The Court of Appeals opinion appears to impose the strict evidentiary burden that a *Title VII* employment discrimination plaintiff must prove that the employer's discriminatory/retaliatory animus was the "sole" cause of the adverse employment action.

The Court of Appeals conclusion that Mrs. Roberts had to prove that the retaliatory animosity which spawned the three anti-Roberts' petition was the "sole" factor which motivated Dr. Cancellaro to transfer her in order to prevail on her imputed animus *Title VII* retaliation claim [App. A, 16a] is a substantial departure from the *Title VII* law established by this Court. Dr. Cancellaro admitted that Dr. Dunn's June 14, 2001 petition signed by 11 other physicians caused him to believe that the VA's surgical services would be "decimated" [App. E., 75a], that he "could not wait" [App. E, 76a], and that he immediately reassigned Mrs. Roberts. The uncontradicted testimony of Dr. Dunn and Dr. Battle prove that their being told that Mrs. Roberts' EEO charges had forced Lori Hagen to resign her Nurse Manager OR position motivated the generation and the signing of the anti-Roberts petition [App. G, 110a] which convinced Dr. Cancellaro to transfer Mrs. Roberts from her CRNA position to the ER on June 27, 2001.

To recover for the VA's retaliation, Mrs. Roberts had to show that the EEO-retaliation was a "determining and motivating factor" in her removal.

She is not required to show that EEO-retaliation was the "sole" reason the VA removed her from her CRNA position. *Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 153, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).*

The evidentiary analysis of *Title VII* discrimination and retaliation claims established by this Court has never required a *Title VII* employee-plaintiff to prove "sole" causation. This Court has ruled that the statutory phraseology "because of" does not mean "solely because of." A *Title VII* plaintiff need only demonstrate that the discriminatory reason "played a motivating part in an employment decision." *Price Waterhouse v. Hopkins, 490 U.S. 228, 244, 246, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989).* The Court of Appeals transposition of the more restrictive definition of discrimination liability into Mrs. Roberts *Title VII* case conflicts with the relevant employment decisions of this Court and warrants this Court's granting the Petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-6059

[Filed June 25, 2008]

NANCY H. ROBERTS,

Plaintiff-Appellant,

v.

ANTHONY J. PRINCIPI, Secretary of U.S. Department of Veterans Affairs, U.S. DEPARTMENT OF VETERANS AFFAIRS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

OPINION

BEFORE: ROGERS, COOK, and McKEAGUE, Circuit Judges.

McKEAGUE, Circuit Judge. Nancy H. Roberts sued her employer, the United States Department of Veterans Affairs ("VA"), alleging various federal claims, including retaliation under Title VII of the Civil Rights Act of 1964. After holding a bench trial, the district court found that Roberts had failed to establish a causal connection between her protected activity and any adverse acts of the VA. The district court dismissed her retaliation claim.

On appeal, Roberts argues that the retaliatory animus of her coworkers should be imputed to the ultimate decisionmaker, who Roberts concedes did not otherwise hold any retaliatory animosity towards her. Because the decisionmaker engaged in an independent investigation, however, we reject Roberts's imputation argument and affirm the judgment of the district court.

I

The district court's findings of fact are located at pages 2-12 of its written opinion following the bench trial. *Roberts v. Principi*, No. 2:02-CV-166 (E.D. Tenn. June 16, 2006). We summarize the pertinent facts on appeal:

Roberts, a Caucasian female, was fifty-three years old when she sued. The James H. Quillen Veterans Affairs Medical Center ("VAMC") in Johnson City, Tennessee, employed Roberts as a Certified Registered Nurse Anesthetist ("CRNA"). From the time of her

appointment in 1996 through the end of June 2001, Roberts served in the anesthesia section of the VAMC's surgical service. Each operating room was staffed by a single CRNA assigned by the anesthesia section and at least two registered nurses assigned by the nursing service. CRNAs administered anesthesia under the oversight of an anesthesiologist.

The anesthesia section included six CRNAs and one licensed practical nurse. During the relevant period, the CRNAs were, in order of seniority: Wanda Ibrahim, Carolyn Harris, Roberts, Rachel Weston, Ruben Fuentes, and Cathy Jo Hunt. Ibrahim had been designated lead CRNA for many years and performed most of the administrative functions attendant to that position. Dr. Clarence Goulding supervised the surgical service, including the anesthesia section. Dr. Goulding reported to Dr. Louis Cancellaro, the Medical Chief of Staff. The registered nurses and licensed practical nurses reported to Juan Morales, R.N. Dr. Cancellaro and R.N. Morales reported directly to Dr. Carl Gerber, Director of the VAMC.

In January 2001, Fuentes directed profane, vulgar, and gender-oriented comments at Roberts and some of the other CRNAs. Roberts complained to Dr. Goulding about Fuentes's comments, to no avail. On January 29, 2001, Roberts contacted a VA Equal Employment Opportunity ("EEO") counselor and complained about Fuentes's actions and Dr. Goulding's lack of response to her complaints. At the suggestion of the EEO counselor, Roberts took her complaints to Dr. Theron T. Knight, Jr., the VAMC Chief of Surgery. Dr. Knight assured Roberts that he would talk with Fuentes and Lori Hagen, Nurse Supervisor, who Roberts also

alleged had made hostile and retaliatory remarks toward her.

Shortly after Roberts spoke with Dr. Knight, Hagen followed her down a hallway and accosted her, something Hagen denied at trial. About the same time, Roberts received a note she alleged came from Fuentes. The note contained vulgar and derogatory comments, which Roberts believed were directed at her. Roberts filed a formal complaint of discrimination with the VA alleging that Hagen and Fuentes had discriminated against her and that Dr. Goulding and Dr. Knight failed to take corrective action.

On June 11, 2001, an EEO investigator called and interviewed Hagen concerning Roberts's EEO charge. The next morning, Hagen told her nursing staff that Roberts had filed an EEO charge against her and that she was resigning her position in the operating room because of Roberts. Hagen later admitted, however, that she had already been interviewed and selected for the Patient Safety Officer position at the VAMC and had planned to transfer to that position because she was burned out in the operating room. Hagen did not disclose this information to her staff but rather blamed her resignation on Roberts's EEO complaint.

After learning of the complaint and Hagen's transfer to another position, various operating-room staff began to circulate three separate petitions against Roberts. R.N. Stephanie Story drafted one of the petitions; twenty-five other members of the operating-room staff signed the petition. Their petition accused Roberts of "inappropriate and intimidating behavior" toward a coworker and of

generally creating discord in the operating room. It did not mention any complaints or EEO charges filed by Roberts. Weston drafted the second petition, which she signed along with Ibrahim, Fuentes, and Hunt. It alleged that Roberts "has filed numerous complaints which have no basis in reality." It further asserted that Roberts "does retaliate, confabulate, and intimidate to obtain her goals." Dr. Julie Dunn, a surgeon and professor at the East Tennessee University College of Medicine, drafted the final petition, which she signed along with eleven other VAMC surgeons. The surgeons' petition mentioned "a complaint . . . filed against Ms. Lori Hagen" and lamented "the continual harassment that Hagen and others have had to endure . . . to the detriment of the Surgical Service." It asked that the VA investigate not only Roberts's complaint, but also investigate Roberts "for further insight into the REAL source of the problem." Hagen did not draft or sign a petition.

The petitions were forwarded to Dr. Gerber, who gave them to Dr. Cancellaro for his review and action. At the time Dr. Gerber forwarded the petitions to Dr. Cancellaro, Dr. Gerber was aware of Roberts's pending EEO charges. He did not, however, inform Dr. Cancellaro of the EEO activity.

Dr. Cancellaro immediately realized that the VAMC had a potentially serious problem which threatened patient care. Dr. Cancellaro was particularly concerned about the petition signed by the VAMC surgeons. Fearing that the disruption in the operating room directly affected patient care, Dr. Cancellaro summoned Roberts, whom he did not know, to his office on June 27, 2001, and informed her that

he had received complaints against her and that he was removing her temporarily from the anesthesia section and detailing her to the VAMC's emergency room as a staff nurse. Dr. Cancellaro felt that he could not wait for a formal investigation because of the potential impact on patient care threatened by the discord in the operating room.

The VAMC commissioned a factfinding board to investigate the matter. The board interviewed Roberts along with thirteen of her coworkers. The board issued its final report on July 18, 2001. It found, among other things, that Roberts had a short temper that sometimes was exhibited in front of patients, was demeaning to nurses, and, as a result of her "attitude, behavior and lack of respect of her coworkers," "created an atmosphere of fear and intimidation in the surgical work area." FFB Rep. at 3-4. The board concluded that the allegations made in the petitions were true and recommended that "under no conditions should [Roberts] be returned to the operating room." *Id.* at 5.

Because he considered a permanent transfer a drastic action, Dr. Cancellaro wanted a more formalized review of the issues involving Roberts. The VAMC authorized an Administrative Board of Inquiry ("ABI") comprised of employees from other VA facilities to hear sworn testimony concerning the matter. The ABI took sworn testimony or declarations from twenty-nine people (including Roberts and witnesses she suggested) and reviewed various documents dating from 1999 to 2002. At the conclusion of its investigation, the ABI issued a formal written report on May 16, 2002. The ABI's findings

were similar to those of the earlier factfinding board: Roberts's behavior and relationships with most of her coworkers contributed to "a very stressful working environment"; she was hostile and disrespectful to anyone who had an authority role; and putting Roberts back into the surgical service would "recreate the very dysfunctional environment, possibly at an elevated state." ABI Rep. at 3-5. The ABI concluded, "[T]he reappointment of Ms. Roberts to the anesthesia service would be detrimental to the James H. Quillen VA Medical Center Surgery Program as many surgeons would reportedly resign and patient care could be compromised through the many distractions this would cause." *Id.* at 6.

Based on the findings and recommendations of the ABI, Dr. Cancellaro permanently reassigned Roberts to the VAMC's GI lab in August 2002. According to Dr. Cancellaro, the ABI findings were sufficient to warrant permanent reassignment; he denied having any retaliatory motive. Roberts's pay and benefits remained the same after the transfer, although she did lose the opportunity for certain overtime pay and was working in a position that did not permit her to use her CRNA skills to the same extent. Roberts remained in the GI lab until it was consolidated with surgical services in July 2005. Roberts was later assigned to the VAMC's bronchoscopy lab.

Roberts's transfer spawned two separate lawsuits. In June 2002, Roberts sued the Secretary and the VA in the Eastern District of Tennessee. She alleged discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), retaliation for engaging

in activity protected under Title VII, and violation of the Freedom of Information Act ("FOIA").

In November 2002, Roberts sued five of her coworkers in state court. The Government removed the suit to federal district court. On the Government's certification and motion, the district court substituted the Government as the defendant and dismissed the action for lack of subject-matter jurisdiction pursuant to the Westfall Act. A panel of this court affirmed on appeal. *Roberts v. United States*, 191 F. App'x 338 (6th Cir.), *cert. denied*, 127 S. Ct. 683 (2006).

As to her suit against the Secretary and the VA, Roberts abandoned her ADEA claim while the defendants conceded an inadvertent violation of FOIA. The district court held a two-day bench trial on her Title VII retaliation claim.

The district court heard testimony from Roberts's coworkers that, while her professional performance as a CRNA was generally adequate (except as recounted by Dr. Janet Brown, *see infra*), her interpersonal relationships were poor. For quite some time, Roberts had been a source of discontent within the operating room. Hagen testified that Roberts had harassed her for about two years prior to the filing of the EEO complaint, constantly made complaints to her supervisors, and sought favoritism through the inappropriate giving of gifts.

Roberts displayed problems with anger management, something the factfinding board cited in support of its recommendation. Both Weston and Ibrahim testified at trial that Roberts had problems

getting along with others and would not cooperate with the group. According to Weston, Roberts exhibited repeated outbursts of anger and chronic temper tantrums since her assignment to the operating room. Ibrahim experienced a host of conflicts with Roberts. Roberts made numerous complaints against Ibrahim and complained about her room assignments and holiday duty. Roberts was absent from the department for long periods of time which led to anger and resentment by other CRNAs. In short, Roberts was demanding, disruptive, and irrational, according to several of her fellow CRNAs.

Carol Dubay, a registered nurse, testified that the operating room was a high stress, fast-paced place. According to Dubay, Roberts caused significant stress in the operating room and would become angry, slam doors, and throw things. Dubay testified that she did not want to work with Roberts. According to Dubay, the atmosphere in the operating room improved considerably after Roberts left.

Dr. Dunn testified that she drafted the surgeons' petition without request by or input from Hagen. While she acknowledged that she had not personally seen any detrimental patient impact attributable to Roberts, she testified that she would not have continued to allow her patients to be placed under Roberts's care. Roberts disrupted the operating room, caused morale problems, and created stress in the operating room that was counterproductive to patient care. Morale and work flow improved after Roberts left the operating room, in Dunn's opinion.

In the view of the district court, the most damning testimony about Roberts's performance came from Dr. Janet Brown, an ophthalmologic surgeon at the VAMC. Dr. Brown, an assistant professor at the East Tennessee University College of Medicine for ten years, had performed surgery at VAMC for nineteen years. Dr. Brown performed cataract surgery using topical anesthesia applied with the patient awake. As recounted in the ABI report and reiterated during trial, Dr. Brown testified that Roberts did not adequately sedate several of her patients, which resulted in complications. She testified that Roberts was unwilling to communicate with the doctor or comply with her requests. Roberts's actions increased patient risk, discomfort, and stress. Dr. Brown reported Roberts's inadequate job performance to Dr. Goulding but there was no change in Roberts's performance. Dr. Brown testified that she would never allow Roberts to work with her again. The district court found Dr. Brown to be a wholly credible witness.

Roberts disputed much of her coworkers' testimony. She rejected the notion that she created the discord in the operating room. Rather, she placed the blame primarily on Hagen and Fuentes. She also pointed out the positive performance appraisals she received since leaving the operating room.

After the close of proofs, the district court took the case under advisement. The district court subsequently issued a written opinion and judgment dismissing Roberts's retaliation claim for lack of a causal connection between any retaliatory motives of her coworkers and Dr. Cancellaro's decision to transfer her to another department. The district court

determined Roberts had "created disruption and disharmony in the operating room," "had great difficulty getting along with others," and "more importantly, that she refused direct physician directives in dealing with patient sedation." *Roberts*, D. Ct. Op. at 15. The district court found that, together, these problems "had a clear potential for significant, detrimental impact on patient care at VAMC." *Id.* It was this potential impact on patient care, rather than retaliatory animus, that caused her transfer, according to the district court. *Id.* at 19-20. The district court also denied Roberts's claim of attorneys' fees in connection with the FOIA violation. *Id.* at 25.

Roberts appealed.[1]

II

A. Standard of Review

The district court issued findings of fact and conclusions of law after the bench trial. Under Federal Rule of Civil Procedure 52, we "must not . . . set aside" the findings of fact "unless clearly erroneous." Fed. R. Civ. P. 52(a)(6). We must also "give due regard to the trial court's opportunity to judge the witnesses' credibility." *Id.* "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. This is so even

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[1] On appeal, Roberts focuses entirely on her Title VII retaliation claim. Accordingly, she has abandoned any appeal as to her claim for attorneys' fees under FOIA. *Renkel v. United States*, 456 F.3d 640, 642 n.1 (6th Cir. 2006).

when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (internal citations omitted). As for the district court's legal conclusions, we review these de novo. *Pressman v. Franklin Nat'l Bank*, 384 F.3d 182, 185 (6th Cir. 2004).

When reviewing the judgment of a district court after a bench trial, we do not analyze the plaintiff's claim under the burden-shifting paradigm of *McDonnell-Burdine*, but instead focus on the "ultimate question" of discriminatory retaliation. *Noble v. Brinker Int'l, Inc.*, 391F.3d 715, 720 (6th Cir. 2004). As the Supreme Court has explained,

> [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a *prima facie* case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption drops from the case, and the factual inquiry proceeds to a new level of specificity.

U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-15 (1983) (internal citations and quotation marks omitted). Moreover, whereas at the summary judgment stage, a plaintiff need only come forth with something more than a scintilla of evidence to show that a genuine issue of fact exists, at the trial stage, the plaintiff must prove every element of her claim by

a preponderance of the evidence. *See Poland v. Chertoff*, 494 F.3d 1174, 1180 n.2 (9th Cir. 2007).

B. Retaliation

1. Section 704(a)

Section 704(a) of Title VII prohibits retaliation by covered employers for two types of activity, opposition and participation:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). To succeed on a claim of retaliation, the plaintiff must prove that she engaged in protected activity; that her employer knew she engaged in protected activity; that her employer took materially adverse action against her; and, finally, that her employer took the action because she engaged in protected activity. *See id.*; *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68-69 (2006). The district court held that Roberts's claim failed at the causation stage.

2. Causation

Roberts had to prove that the animus created by her protected activity caused the VA to transfer her.

She concedes that the ultimate decisionmaker—Dr. Cancellaro—did not harbor any retaliatory animosity toward her.[2] It is also undisputed that patient care is a primary concern for the VAMC and that the VAMC has the authority and obligation to deploy employees and assets in a manner that optimizes such care. Roberts does not take issue with these contentions, but instead argues that patient care was not the motivating factor for her transfer. Rather, she argues that the retaliatory animus of Hagen and her supporters so influenced Dr. Cancellaro's decision that their animus should be imputed to him. He was, according to Roberts, a mere (but effective) conduit in their efforts to retaliate against her.

The record is clear that Hagen and at least some of the petition signatories acted against Roberts because of her EEO activity. Hagen knew of the EEO charge against her and told her nurses, who then drafted and signed one of the petitions. The surgeons' and CRNAs' petitions specifically mention Roberts's "complaint," although neither states that the complaint was an EEO charge. Without Hagen's outburst after being informed of the EEO charge, it is unlikely that the three petitions would have been given to Dr. Cancellaro in June 2001.

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[2] Although Roberts suggests at various places in her briefs that Dr. Gerber was also a decisionmaker, the district court focused on Dr. Cancellaro as the actual decisionmaker. As the record demonstrates, Dr. Gerber delegated to Dr. Cancellaro the responsibility for determining whether to transfer Roberts, although Dr. Gerber did sign off on her permanent transfer.

Yet, as noted by the district court, the discriminatory or retaliatory animus of a coworker is not usually relevant to whether the employer violated Title VII. Rather, the relevant beliefs or motivations are those of the actual decisionmaker, usually a supervisor or manager. *Bush v. Dictaphone Corp.*, 161 F.3d 363, 369 (6th Cir. 1998) ("[S]tatements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself [cannot] suffice to satisfy the plaintiff's burden . . . of demonstrating animus." (internal quotation marks omitted)); *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1161 (6th Cir. 1990) ("[A] statement by an intermediate level management official is not indicative of discrimination when the ultimate decision to discharge is made by an upper level official."); *cf. Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (concluding that Congress "evince[d] an intent to place some limits on the acts of employees for which employers . . . are to be held responsible" under Title VII). Whether some of Roberts's coworkers reacted to her EEO activity is of little consequence if they did not, in some sense, cause her transfer.

Roberts attempts to show exactly that—her coworkers, fueled by Hagen's outburst, drafted three inflammatory petitions, which influenced Dr. Cancellaro so strongly that it can be said that her coworkers caused her transfer. Dr. Cancellaro's testimony confirms that he relied principally, if not solely, on the petitions when he decided to transfer Roberts temporarily to the emergency room. Roberts does not, however, claim in her briefs that this temporary transfer, in and of itself, constituted a violation of Title VII. Rather, she focuses on whether

her permanent reassignment was made in retaliation for her EEO activity. This is the issue that the district court considered, *see Roberts*, D. Ct. Op. at 14, and Roberts does not raise any claim of error on appeal as to the scope of the district court's analysis.[3]

Had Dr. Cancellaro made his decision to transfer Roberts permanently based solely on the three petitions, Roberts would have a strong argument that Dr. Cancellaro was nothing more than a conduit or a "cat's paw" of her coworkers' retaliatory animosity. "In the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who lacks decision making power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476,484 (10th Cir. 2006), *cert. dismissed*, 127 S. Ct. 1931 (2007); *see also Arendale v. City of Memphis*, 519 F.3d 587, 604 n.13 (6th Cir. 2008)("When an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias, this Court has held that the employer may be held liable under a 'rubber-stamp' or 'cat's paw' theory of liability.").[4]

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[3] At oral argument, plaintiff's counsel stated that the initial transfer was itself a separate claim for relief. Because counsel raised the issue only at oral argument, however, we decline to review it. *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 714 (6th Cir. 2001) (explaining that the court of appeals will "not reward quick-thinking counsel by entertaining grounds brought to [the court's] attention for the first time at oral argument").

[4] The Tenth Circuit described the origin of the term "cat's paw" as follows:

Under this theory, the subordinate, not the nominal decisionmaker, is the driving force behind the employment action. When a decisionmaker acts in accordance with a retaliator's bias "without [him]self evaluating the employee's situation," the retaliator "clearly causes the tangible employment action, regardless of which individual actually" enforces the adverse transfer or termination. *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998) (citations omitted). "In effect, the [retaliator] *is* the decisionmaker, and the titular 'decisionmaker' is a mere conduit for the [retaliator's] discriminatory animus." *Id.* (emphasis in original). Imposing liability on the employer in this context is in accord with the agency principles and policies underlying Title VII. *BCI Coca-Cola*, 450 F.3d at 485-86.

However, when a decisionmaker makes a decision based on an independent investigation, any causal link between the subordinate's retaliatory animosity and the adverse action is severed. *Wilson v. Stroh Cos.*, 952 F.2d 942, 946 (6th Cir. 1992); *see also BCI Coca-Cola*, 450 F.3d at 485 (explaining that "a plaintiff could not prevail because the decisionmaker had conducted an independent investigation of the facts, rather than

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The "cat's paw"doctrine derives its name from a fable, made famous by La Fontaine, in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. As the cat scoops the chestnuts from the fire one by one, burning his paw in the process, the monkey eagerly gobbles them up, leaving none for the cat. Today the term "cat's paw" refers to one used by another to accomplish his purposes.

BCI Coca-Cola, 450 F.3d at 484 (internal quotation marks and citations omitted).

relying entirely on the recommendation of the biased subordinate"); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 725 (8th Cir. 1998) (affirming summary judgment for employer school district because the board had engaged in an independent investigation rather than rely simply on the desires of school administrators). By making a decision based on an independent investigation, the decisionmaker confirms that he is acting as a true agent of the employer and not a mere conduit of the subordinate. The question becomes, then, whether the investigation here was an independent one or merely a façade. *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990).

Dr. Cancellaro did not himself investigate the factual assertions made in the petitions, but neither did he uncritically accept them as true. Instead, he first appointed an internal factfinding board and then, wanting a more thorough examination, appointed an external board with the power to take sworn testimony. The ABI alone took sworn testimony or statements from almost thirty persons, including Roberts. These investigations were more extensive than ones found adequate by this and other courts to break any causal link between a coworker's animosity and an adverse action. *Wilson*, 952 F.2d at 944, 946 (affirming summary judgment in favor of the employer, the Sixth Circuit found that a manager's discussion with one witness was sufficient for the investigation to be independent); *see also Llampallas*, 163 F.3d at 1249 (finding that a meeting between a supervisor and the plaintiff was sufficient "to except this case from the cat's paw line of cases"); *Lacks*, 147 F.3d at 725 (concluding that the school board's

investigation, consisting of hearing testimony from the plaintiff and fifteen other witnesses, reviewing various documents, and watching a videotape, was sufficient for the investigation to be deemed independent).

Even if some of the witnesses who testified before the ABI had a hidden agenda, that alone is not sufficient to compel a finding that the agenda caused the adverse action. Where the employer's decisionmaker tries to get all sides of the story, the employer will not be held liable solely because one side might harbor a hidden bias against the plaintiff employee. *See Llampallas*, 163 F.3d at 1250. As the Tenth Circuit explained, "[S]imply asking an employee for his version of events may defeat the inference that an employment decision was ... discriminatory." *BCI Coca-Cola*, 450 F.3d at 488 (emphasis added).

The Ninth Circuit, however, appears to apply a more lenient standard for establishing causation. In *Poland*, that court held:

> [I]f a subordinate, in response to a plaintiff's protected activity, sets in motion a proceeding by an independent decisionmaker that leads to an adverse employment action, the subordinate's bias is imputed to the employer if the plaintiff can prove that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or decisionmaking process.

494 F.3d at 1182. A broad reading of this holding would impose employer liability whenever a biased

subordinate "influence[s]" an investigation by, for example, talking with the investigator, giving the investigator a list of possible witnesses, or otherwise forwarding information to the investigator.[5] Yet, it is hard to fathom in practical terms how an investigator can know ahead of time that a particular subordinate harbors discriminatory or retaliatory animosity against the employee. Typically, it will only be with the benefit of 20/20 hindsight that the animosity will become clear. As long as the decisionmaker seeks input from all sides of the dispute (most importantly from the targeted employee) and as long as the decisionmaker does not permit a subordinate's biased view to become the overriding influence, then the resulting decision will be an independent one.

Roberts understandably wants us to focus on the petitions. Yet, those petitions were largely, if not wholly, irrelevant to Dr. Cancellaro when he made his final decision. As he recounted during trial, "It's not sufficient just to sign a piece of paper . . . ." Trial Tr. at 375. Rather, it was the ABI's report upon which he based his final decision. The ABI report made clear that the problems with Roberts predated Hagen's outburst about the EEO charges and the subsequent petitions. This message was reinforced at trial. Several of the witnesses testified that their problems with Roberts were caused by her longstanding intimidation, hostility, and passive-aggressive

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[5] *Poland* is also factually distinguishable from the present case. The subordinate's influence on the investigation in *Poland* was much more extensive than was Hagen's. *See Poland*, 494 F.3d at 1178. Moreover, the investigative panel did not ask Poland to identify witnesses on his own behalf. *Id.*

personality. While several of the witnesses knew about Roberts's EEO charges before they complained about her to management, some asserted that they did not, including Dr. Brown whose testimony was fully credited by the district court.

Roberts also points to certain statements made by the ABI to support her position that there was no valid justification for transferring her. While noting some of the performance issues identified by several of the witnesses, the ABI concluded that there was "nothing concrete and substantial" upon which to base a transfer out of the operating room. ABI Rep. at 6. Moreover, the ABI could "find no regulations or actions that could support the revocation of Ms. Roberts'[s] privileges as a CRNA." *Id.* Roberts argues that these statements, along with her positive performance reviews since leaving the operating room and the trial testimony of Dr. James Battle, who testified that he had no problems with Roberts's professional performance, confirm that the VA could "not legally justify, or cause," her permanent transfer. Appellant's Reply Br. at 11.

Roberts conflates legal justification with causation. In any event, what Roberts largely ignores is the ABI's conclusion that Roberts's *personality* caused considerable discord within the operating room. The ABI went so far as to predict that her "return [to the surgical service] would likely cause the downfall of Mountain Home's surgical program." ABI Rep. at 5. In the ABI's words, Roberts's reentry into the operating room "could certainly impact patient care" in a negative way. *Id.*

Whether the ABI could identify a particular VA regulation to support the reassignment did not bind Dr. Cancellaro. Personality conflicts can cause a group to become dysfunctional, and a dysfunctional group working in an operating room can increase the risk of patient injury or death, regardless of the technical skills of each individual doctor or nurse. Dr. Cancellaro had the discretion to reassign VAMC assets, including employees, to further the VAMC's goal of patient care. As long as his decision was based on that permissible goal, rather than an impermissible, retaliatory motive, he could transfer her without violating Title VII.

Roberts is correct that the ABI did not place the entire blame on her. Dr. Goulding's supervision was, to say the least, lax. There appears to have been few effective controls over or documentation of personnel issues. Moreover, Roberts was never even given copies of the petitions until after she filed this lawsuit. Others in the operating room reciprocated Roberts's ill-treatment without much, if any, intervention by supervisors. Stronger management in the operating room might have been able to defuse the problems earlier. With that said, it is clear that Roberts was a fountainhead of discord in the operating room; after her removal, the operating room settled and everyone began working as a team.

While Roberts does have some record evidence—primarily her testimony and the three petitions—to support the inference that Dr. Cancellaro acted as a mere conduit of her coworker's retaliatory animus, she has failed to marshal sufficient evidence to compel that factual finding. Accordingly, under the

deference afforded to the district court's factual findings, we conclude that the district court did not clearly err in finding that Roberts failed to establish that her permanent transfer was caused by any retaliatory animus of her employer.

III

For the reasons set forth above, we AFFIRM the judgment in favor of the defendants.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT GREENEVILLE

NO. 2:02-CV-166

[Filed June 16, 2006]

NANCY H. ROBERTS	)
	)
v.	)
	)
ANTHONY J. PRINCIPI,	)
SECRETARY OF VETERANS AFFAIRS	)
	)

MEMORANDUM OPINION

This civil action was originally brought by plaintiff, an employee of the United States Department of Veterans Affairs ("VA"), alleging discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 26 U.S.C. §§ 621 *et seq.*, adverse employment action in retaliation for having engaged in protected EEO Title VII activity in violation of 42 U.S.C. § 2000e *et seq.*, and violation of the Freedom of Information Act ("FOIA"). Plaintiff has abandoned her ADEA claim and defendant has conceded an

inadvertent violation of FOIA.[1] Plaintiff's retaliation claim proceeded to trial before the Court without intervention of a jury on January 18-19, 2006.

Findings of Fact

The plaintiff in this civil action is Nancy Roberts ("Roberts"), a 57[2] year old Caucasian female Certified Registered Nurse Anesthetist (CRNA) who is employed full-time by the James H. Quillen Veterans Affairs Medical Center (VAMC) in Johnson City, Tennessee. Roberts has worked at VAMC since 1996, having been selected for a position in the surgical service at VAMC through a competitive process. She received an appointment to a position as a CRNA pursuant to 38 U.S.C. § 7401 *et seq*. Under this type of appointment, the VA hires health care professionals and provides them pay enhancements and incentives because of their specialized medical skills.

From the time of her appointment in 1996 through June 30, 2001, Roberts was assigned to serve as a CRNA in the surgical service, which included the anesthesia section, and which was led by Dr. Clarence Goulding. The anesthesia section included six CRNAs and one licensed practical nurse. Dr. Goulding was the direct line supervisor of the plaintiff and the other five

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[1] Because the VA later provided to Roberts all the documents requested by her pursuant to the FOIA, the merits of her FOIA claim for relief are MOOT. Her eligibility and entitlement to recover attorneys fees, however, must still be resolved.

[2] Plaintiff was 53 year old at the time of the filing of her complaint. Her age is irrelevant to her remaining claim.

CRNAs. The CRNAs, at the time in question during 2001, were, in order of seniority: Wanda Ibrahim, Carolyn Harris, Nancy Roberts, Rachel Weston, Ruben Fuentes and Cathy Jo Hunt. Wanda Ibrahim had been designated lead CRNA by Dr. Goulding for many years and performed most of the administrative functions attendant to that position.

During the relevant time period, the surgical service at VMAC operated five operating rooms five days a week, usually 52 weeks per year. This required the coordination of several different services and components of the hospital. Both the anesthesia section and the surgery service were managed by the Medical Chief of Staff, Dr. Louis Cancellaro ("Cancellaro"). The registered nurses and licensed practical nurses who worked in the operating room were part of the nursing service, which was headed by Juan Morales, R.N. Morales and the nursing service answered directly to Dr. Carl Gerber ("Gerber"), Director of the VAMC. Each operating room at the VMAC was staffed by a single CRNA assigned by the anesthesia section and at least two registered nurses assigned by the nursing service. CRNAs administer anesthesia under the oversight of an anesthesiologist. Typically, the VAMC performed approximately 50 scheduled surgeries per week. In addition, the VAMC also performed emergency surgery which required that nurses and anesthetists remain on call to perform emergency work. At the time in question (1996 through June 30, 2001), the VAMC had five operating room suites. Typically, four were used at any one time, leaving one operating room free for surgical-type diagnostic procedures and for emergencies. Most surgeries were scheduled to be performed between the

hours of 7 a.m. and 3 p.m. As a result of the schedule, five CRNAs typically worked the 7 to 3 shift, and the sixth CRNA worked after the 3 p.m. shift ended. The CRNAs shared both the shift schedule and emergency call duties on a rotating basis.

During January, 2001, Roberts had certain profane, vulgar and gender oriented comments directed at her and other female CRNAs by male co-worker Ruben Fuentes, a CRNA who had been hired in 1999. Roberts complained about Fuentes' behavior to the chief of the anesthesia section, Dr. Goulding. On January 29, 2001, Roberts contacted a VA Equal Employment Opportunity (EEO) counselor and complained about Fuentes' actions and Dr. Goulding's lack of response to her complaints. Apparently at the suggestion of the EEO counselor, Roberts utilized the existing command structure at the VA and took her complaints to Dr. Theron T. Knight, Jr., the VAMC Chief of Surgery. Dr. Knight assured Roberts that he would talk with Fuentes and Lori Hagen ("Hagen"), Nurse Supervisor, who Roberts also alleged had made hostile and retaliatory remarks toward her. According to Roberts, Fuentes and Hagen thereafter altered their abusive behavior toward her.

Roberts alleges that after the time limit for her to file a "formal" claim of discrimination and retaliation had expired, Hagen followed her down a hallway and accosted her, something Hagen denies. About the same time, Roberts was shown a note by a co-worker which the co-worker claimed Ruben Fuentes had given her for delivery to Roberts. The note contained vulgar and derogatory comments which Roberts believed were directed at her. In April, 2001, Roberts filed a formal

complaint of discrimination with the VA alleging that nurse supervisor Hagen discriminated against her on April 19, 2001. The investigator assigned to the complaint telephoned and interviewed nursing supervisor Hagen concerning Roberts' allegations. Shortly after her conversation with the investigator, Hagen walked out of her nurse manager's office and told her nursing staff in the operating room that Roberts had just filed EEO charges against her and that she was resigning her position in the OR because of Roberts. Hagen admitted at trial that she had already been interviewed and selected for the Patient Safety Officer position at the VA and already planned to transfer to that position from her position as nursing supervisor, because she was "burned out" in the operating room. Hagen did not disclose this information to her staff but rather blamed her resignation on Roberts' EEO complaint. After learning of the EEO complaint and Hagen's plans to transfer to another position, various operating room staff began to circulate several petitions against Roberts which criticized her for filing a "complaint against Ms. Hagen" and of behavior which created a hostile work environment.[3] A petition circulated by the nurses accused the plaintiff of "inappropriate and intimidating behavior" toward a co-worker and of generally creating discord in the operating room. These petitions were forwarded to VAMC Director Gerber. Gerber gave the petitions to Cancellaro for his

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[3] One petition was drafted by CRNA Rachel Weston and was signed by four CRNAs. A second petition was drafted by nurse Stephanie Story and was signed by nursing staff employees. A third petition was drafted by Dr. Julia Dunn and was signed by her and eleven other VAMC surgeons.

review and action. At the time Gerber forwarded the petitions to Cancellaro, Gerber was aware of Roberts' EEO charges.

Cancellaro immediately realized that the VAMC had a potentially serious problem which threatened patient care. Cancellaro was particularly concerned about the petition signed by Dr. Julie Dunn and eleven (11) other VAMC surgeons. Fearing that the disruption in the operating room directly affected patient care, Cancellaro summoned Roberts, who he did not know, to his office on June 27, 2001 and informed her that he had received complaints against her and that he was removing her temporarily from the anesthesia section and detailing her to the VAMC's emergency room as a staff nurse.[4] A temporary detail is not punitive and the employee retains the same salary and benefits as before. A temporary detail can be made for six months and extended for another six

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[4] As a general rule, a temporary transfer which results in no reduction in pay or benefits is not an "adverse employment action." *See Yates v. AVCO Corporation*, 819 F. 2d 630 (6th Cir. 1987). An adverse employment action is "an employment decision that is materially adverse in that it is more than a mere inconvenience or an alteration of job responsibilities." This typically includes "termination, demotion, diminished pay, a less distinguished title, a material loss of benefits, significantly diminished responsibilities, or other unique indices." *Jones v. City of Allen Park*, 2006 WL 13109 (6th Cir. (Mich.)). Roberts claims that her later permanent reassignment to the GI lab deprived her of the opportunity to receive certain overtime pay and resulted in job responsibilities not commensurate with her training as a CRNA. Although Roberts rarely worked overtime in the operating room and actively attempted to avoid it, the lost opportunity to sign up for overtime is sufficient to establish an adverse employment action. *Id.* at * 6.

months. A final decision must be made within one year of the temporary detail. Cancellaro felt he could not wait for a formal investigation because of the potential impact on patient care threatened by the discord in the operating room. Roberts attempted to discuss her EEO charges with Cancellaro at the time of the June 27, 2001 meeting; however, Cancellaro responded that he did not want to hear anything about the EEO charges.

On June 20, 2001 a fact finding board commissioned by the VA was charged with looking at the issues involved in the three petitions. The fact finding board began interviewing witnesses in an informal setting on June 28, 2001. Roberts was interviewed on that date but advised the board that she was unaware of the accusations against her, was unprepared to defend herself and that she believed the fact finding proceedings were in retaliation for having filed EEO charges. The board then adjourned until July 6, 2001. The fact finding board issued its final report on July 18, 2001 and recommended that Cancellaro permanently remove Roberts from the surgery service because of patient safety concerns and health care quality concerns.[5]

Seeking a more formal review of the issues involving Roberts, Cancellaro asked the VAMC Director to authorize an Administrative Board of Inquiry (ABI) comprised of employees from other VA facilities to hear sworn testimony concerning the

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[5] The specific findings of the Fact Finding Board are set forth in Trial Exhibit 14.

issues raised by the petitions.[6] The ABI, appointed by VMAC Director Gerber, heard sworn testimony at the VAMC in March, 2002, including testimony from the plaintiff and witnesses proposed by the plaintiff. At the conclusion of its investigation, the ABI issued a formal written report on May 16, 2002. Among its findings, the ABI stated that " . . . the reappointment of Ms. Roberts to the anesthesia service would be detrimental to the James H. Quillen VA Medical Center Surgery Program as many surgeons would reportedly resign and patient care could be compromised through the many distractions this would cause." After receipt of the ABI report, Cancellaro permanently reassigned Roberts to the GI lab at the VAMC. According to Cancellaro, the ABI findings were "very clear and adequate to warrant permanent reassignment." Roberts reassignment was made without any loss of pay or benefits except that she lost the opportunity for certain overtime pay and was working in a position which did not permit her to utilize her CRNA skills. Roberts remained in the GI lab until it was consolidated with surgery services in July, 2005. Roberts is now assigned to VAMC's Bronchoscopy Lab.

Although Roberts professional performance as a CRNA was generally adequate, except for her performance in the operating room during surgeries performed by Dr. Janet Brown as detailed more fully below, her interpersonal relationships with others were less than satisfactory. For quite some time,

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[6] An Administrative Board of Inquiry is never used by the VA to investigate an EEO complaint.

Roberts had been a source of discord and discontent within the operating room. Hagen testified that Roberts had harassed her for about two years prior to the filing of the EEO complaint, constantly made complaints to her supervisors and sought favoritism through the inappropriate giving of gifts. Even Roberts described her relationship with Hagen as "cautious". Roberts displayed problems with anger management, something the Fact Finding Board cited in support of its recommendation.[7] Rachel Weston, another CRNA assigned to the operating room, testified that Roberts "could not get along with anyone" and would not cooperate with the group. Weston reported that Roberts began causing trouble shortly after her assignment to the operating room and wanted various procedures changed. Weston described Roberts' manner as "a bulldozer" and that she constantly made complaints to Dr. Goulding. Weston described disruptive behavior on the part of Roberts, including outbursts of anger, chronic temper tantrums and interruption of others during pre-operative interviews. Roberts was, according to Weston, "demanding", "disruptive" and "irrational".

Dr. Julie Dunn, a general and trauma surgeon at VAMC and professor of surgery at the East Tennessee State University College of Medicine, was responsible for one of the three petitions to the VAMC administration concerning Roberts. While acknowledging that she had personally seen no detrimental patient impact attributable to Roberts, Dr.

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[7] Roberts denied any loss of temper and any "serious" anger management issues.

Dunn felt that the source of the events and morale problems in the operating room at the time was Roberts. Dr. Dunn drafted the petition herself, without request by or input from Hagen, because she thought it "might make a difference." Significantly, Dr. Dunn testified that she would not have continued to allow her patients to be placed under Roberts' care. In Dr. Dunn's opinion, Roberts disrupted the operating room, caused morale problems and created stress in the operating room that was counter productive to patient care. According to Dr. Dunn, morale and work flow improved when Roberts left the operating room.

Carol Dubay, a registered nurse in the operating room at VAMC, testified that the operating room was a high stress, fast paced place and that many of the veterans treated there are "sicker" than private sector patients generally. According to Dubay, Roberts created a lot of the stress in the operating room , became angry, slammed doors and threw things. Roberts' behavior in the operating room put other employees "on edge" and Dubay did not want to work with Roberts. According to Dubay, the atmosphere in the operating room improved considerably after Roberts was detailed out.

Perhaps the most damning testimony about Roberts' performance, however, came from Dr. Janet Brown, an opthamologic surgeon at VAMC. Dr. Brown, an assistant professor at the College of Medicine for ten (10) years, had performed surgery at VAMC for 19 years. Dr. Brown performed a lot of cataract surgery which was done with a topical anesthesia applied with the patient awake. This is very precise surgery, performed in a very quiet and calm environment, and

the patient needs to be very still during surgery. Dr. Brown experienced problems with Roberts not giving sufficient anesthesia to patients and frequently asked Roberts for additional patient sedation because the patient was moving. Roberts did not seem to be willing to communicate with the doctor or comply with her requests. Roberts' behavior caused arguments and kept Dr. Brown from concentrating on her duties. Dr. Brown reported no problem with any other CRNA.[8] Roberts' actions increased patient risk, discomfort and stress. Dr. Brown reported Roberts' inadequate job performance to Dr. Goulding but there was no change in Roberts' performance. Dr. Brown's opinion was that Roberts' performance created a great deal of stress and anxiety in the operating room and "directly affected patient care." Roberts' behavior was "distracting to everyone in the operating room." The operating room was calmer and returned to normal when Roberts was detailed out. Wanda Ibrahim, head CRNA at VAMC, is the most senior CRNA in the operating room. Along with Dr. Goulding, she interviewed Roberts for her position at VAMC and recommended that she be hired. During her first two years at VAMC, Roberts made "lots of complaints" but the problems with her began in earnest in February, 1999, when Ruben Fuentes was hired, according to Ibrahim. Roberts made numerous complaints about Ibrahim and complained about her

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[8] Although Roberts testified that she confronted Dr. Brown about these accusations and that Dr. Brown told her that she was mistaken and had her confused with another CRNA, Dr. Brown denied any such confrontation. No motive for lying on the part of Dr. Brown was suggested to this Court and the Court fully credits Dr. Brown's testimony.

room assignments and holiday duty.[9] Ibrahim experienced a host of conflicts with Roberts. Roberts was absent from the department for long periods of time which led to anger and resentment by other CRNAs.

Cancellaro testified that he did not retaliate against Roberts for filing her EEO complaint. As Chief of Staff, he never became involved in EEO complaints. After receiving the employee petitions from Dr. Gerber, Cancellaro believed that patient care was at risk. As a result of his concern, he temporarily detailed Roberts immediately to another area. After receipt of the ABI report, Cancellaro permanently reassigned Roberts from the operating room.

Analysis

The 1964 Civil Rights Act protects an employee who has "opposed any practice made an unlawful employment practice" by Title VII or who has made a charge under the statutory scheme. 42 U.S.C. § 2000e-3(a) (1988).[10] Thus, this section prohibits an

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[9] Roberts complained, according to Ibrahim, about everything from "a to z."

[10] Section 2000e-3(a) provides in relevant part as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.
>
> 42 U.S.C. § 2000e-3(a) (1994).

employer from retaliating against an employee who has "participated" in any manner in an investigation under Title VII. *Booker v. Brown & Williamson Tobacco Co.*, 879 F. 2d 1304, 1312 (6th Cir. 1989).

To establish a claim under § 2000e-3(a), plaintiff must meet the test of a slightly modified *McDonnell Douglas* framework by showing that: (1) she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took an adverse employment action against plaintiff, or plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. *Morris v. Oldham County Fiscal Court*, 201 F. 3d 784, 792 (6th Cir. 2000) (citing *Canitia v. Yellow Freight Systems, Inc.*, 903 F. 2d 1064, 1066 (6th Cir. 1990)). If plaintiff establishes a *prima facie* case, then the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment action against the plaintiff. *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1917, 36 L. Ed. 2d 668 (1993)). Plaintiff must then demonstrate that the proferred reason was not the true reason for the employment action, i.e. that the reason was a mere pretext for the discrimination. *Id.* (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)).

Although the parties spent considerable time at trial and in their trial briefs addressing the elements of a *prima facie* case and whether or not plaintiff's proof established those elements, that decision was

made by this Court in the context of the defendant's summary judgment motion, which was denied by the Court. The question of whether or not Roberts has made out a *prima facie* case, therefore, is not the focus of this Court's inquiry and, in fact, whether the plaintiff really did so is no longer relevant. A *prima facie* case is defined as sufficient evidence to allow a plaintiff to avoid a directed verdict in a jury case or a motion to dismiss in a non-jury case; "it is the evidence necessary to require the defendant to proceed with his case." *EEOC v Avery Dennison Corp.*, 104 F. 3d 858, 861 (6th Cir. 1997).

After there has been a full trial on the merits, a district court must focus on the ultimate question of discrimination rather than on whether a plaintiff has made out her *prima facie* case, regardless of whether the proceeding is a bench or jury trial. *Kovacevich v. Kent State University*, 224 F. 3d 806 (6th Cir. 2000). That is, "the sole remaining issue [is] 'discrimination *vel non*'." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2897, 147 L. Ed. 2d 105 (2000). "Of course, there is nothing to prevent the court from considering evidence that also bears on that *prima facie* case as long as it does so in order to address the ultimate question of discrimination." *Kovacevich*, 224 F. 3d at 825. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 518, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)(quoting *Burdine*, 450 U.S. at 253, 101 S. Ct. 1089).

Against this backdrop, this Court is thus faced with a very simple issue: Was plaintiff's permanent reassignment to the gastrointestinal lab on August 1, 2002 an adverse employment action taken in retaliation for the filing by her of an EEO complaint in April, 2001?[11] Said differently, this Court must decide whether or not the defendant has discriminated against plaintiff as a result of her having participated in protected activity. Participation clause claims, such as the plaintiff's here, must be liberally construed. As the Sixth Circuit has stated in its *Booker* decision:

> The "exceptionally broad protections" of the participation clause extends to persons who have "participated in any manner" in Title VII proceedings. *Pettway v. American Cast Iron Pipe Co.*, 411 F. 2d 998, 1006 (5th Cir. 1969). Protection is not lost if the employee is wrong on the merit of the charge, *Womack v. Munson*, 619 F. 2d 1292, 1298 (8th Cir. 1980), *cert. denied*, 450 U.S. 979, 101 S. Ct. 1513, 67 L. Ed. 2d 814 (1981), nor is protection lost if the contents of the charge are malicious or defamatory as well as wrong. *Pettway*, 411 F. 2d at 1007. Thus, once activity in question is found to be within the scope of the participation clause, the

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[11] Plaintiff claims a whole host of actions on the part of the VAMC as retaliatory, including the withholding of documents under the FOIA. None of these actions on the part of the VAMC constitute adverse employment actions, and, even if they did, this Court's analysis would not change.

> employee is generally protected from retaliation.
>
> *Booker*, 879 F. 2d at 1312.

Plaintiff's Title VII claim in this case fails for a very simple reason. Plaintiff has failed to establish a causal connection between the protected activity and the adverse employment action taken by the defendant. Defendant has put forth a compelling, non discriminatory reason for the transfer of the plaintiff from the operating room. The proof in this case establishes quite compellingly that plaintiff created disruption and disharmony in the operating room, that she sought to curry favoritism with persons with authority to determine her conditions of employment, that she was often demanding, that she had great difficulty getting along with others on her work team and did not fully cooperate with the group and, more importantly, that she refused direct physician directives in dealing with patient sedation, all of which had a clear potential for significant, detrimental impact on patient care at VAMC. The defendant having articulated a legitimate, non-discriminatory reason for its adverse employment action against the plaintiff, plaintiff then has the burden to demonstrate that the proffered reason was merely a pretext for discrimination. Plaintiff has failed in this burden.

In support of plaintiff's effort to establish a causal link between the filing of her EEO complaints and her reassignment from the operating room, plaintiff relies heavily on the actions of her co-workers in distributing various petitions throughout the operating room after these employees had learned of the EEO complaints

filed by Roberts against nursing supervisor Hagen. Even if these employees were motivated by the filing of Roberts' EEO complaint, that is largely irrelevant here. None of the employees involved in the petitions were the decision makers in this case and actions and/or statements by subordinates normally are not probative of an intent to retaliate by the actual decision maker. *Willis v. Marion County Auditors Office*, 118 F. 3d 542 (6th Cir. 1997).

A causal link may also be shown through knowledge combined with closeness in time that creates an inference of causation.[12] In order to make such a showing, however, the plaintiff must produce sufficient evidence for the Court to infer that the employer would not have taken the adverse action had the plaintiff not filed a discrimination action. *See Avery Dennison Corp.*, 104 F. 3d at 861. In order to meet the burden of proof on causal connection, the plaintiff must "put forth some evidence to deduce a causal connection between the retaliatory action and the protected activity [which requires] the court to draw reasonable inferences from that evidence, providing it is credible." *Id.* Plaintiff also argues that the temporal proximity between the filing of her complaints and the adverse employment action

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[12] While the parties in this case have vigorously litigated the question of knowledge on the part of the decision maker, Cancellaro, this Court has little difficulty finding that Cancellaro had knowledge of the protected conduct. First of all, Cancellaro was aware from Roberts that an EEO complaint had been filed but, more clearly, both the reports of the Fact Finding Board and the ABI reference pending EEO complaints. It is not disputed that Dr. Gerber also knew of the EEO complaints.

supports an inference of retaliatory discrimination. Temporal proximity alone does not support an inference of retaliatory discrimination in the absence of other evidence; however, closeness in time between the filing of the EEO complaint and the adverse employment action is relevant and may evidence the employer's intent. *Cooper v. City of North Olmsted*, 795 F. 2d 1265, 127273 (6th Cir. 1986)

The burden is on the plaintiff in this case to prove by a preponderance of the evidence that the non-discriminatory reason put forth by the defendant is pretext for discrimination. *See Avery Dennison Corp.*, 104 F. 3d at 862. In meeting this burden, the plaintiff may succeed either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanatior is unworthy of credence. *St. Mary's Honor Ctr.*, 509 U.S. at 502. With respect to the indirect method of proof, which is what is involved in this case, "[i]t is not enough . . . to (dis)believe the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination. *Id.* at 519. The Supreme Court has explained that "Title VII does not award damages against employers who cannot prove a non-discriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of . . ." plaintiff having filed, in the context of this case, EEO complaints. *Id.* at 523-524. Even were this Court not to believe that the reason put forth by the VAMC for the employment action taken against Roberts or that VAMC contrived such evidence (which is not the case), that would not necessarily establish, therefore, that

the plaintiff's claim of discrimination is correct. Instead, this Court must believe the reason offered by the plaintiff, that is, it must believe that the plaintiff was the victim of intentional discrimination. This Court simply cannot find that the plaintiff has carried the burden of proving to this Court by a preponderance of the evidence that she has been the victim of intentional discrimination. Defendant has met its burden of production in this case and has offered a legitimate, nondiscriminatory reason for the action taken against Roberts. Any presumption of discrimination "drops out of the picture" once the defendant meets its burden of production. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). Even though this Court has previously determined, in the context of its summary judgment rulings, that plaintiff has produced sufficient evidence to support a *prima facie* case, the evidence at trial on the elements of the *prima facie* case were close and any inferences of discrimination arising therefrom were weak. The adverse employment action taken by the defendant in this case was slight, considerable question exists about the extent of Dr. Cancellaro's knowledge of the plaintiff's participation in protected activity and there is simply no evidence which has been put forth which suggests, either directly or indirectly, that Cancellaro acted with a discriminatory motive or for any reason other than to protect the quality of patient care at VAMC.

Even though plaintiff has established a *prima facie* case, the defendant has met its burden of production by offering a legitimate, non-discriminatory reason for the adverse employment action taken and Roberts has

failed completely to prove, by a preponderance of the evidence, that the proffered reason of the defendant is pretextual, nor has she shown any other direct or indirect evidence of illegal discrimination in violation of Title VII in the actions taken in transferring her from the operating room at VAMC. No employer in the healthcare field should be required to ignore complaints of actions on the part of an employee which compromise patient welfare simply because the employee has participated in protected activity. The activity engaged in by Roberts, even though it may have been frivolous, was protected activity under the law and she may not be retaliated against for participating in such protected activity; however, Roberts has utterly failed to present evidence sufficient to establish by a preponderance of the evidence that defendant acted against her with a discriminatory motive or for any reason other than to assure the quality of medical care delivered to veterans who seek services through the operating room at VAMC.

An employer does not lose the ability to discipline an employee who engages in employee misconduct merely because she has filed an EEO complaint. *Booker*, 879 F. 2d at 1312. An employee is not protected when she disrupts the work environment and interferes with the attainment of the employer's goals. *Brown v. Ralston Purina Co.*, 557 F. 2d 570, 572 (6th Cir. 1977). If that were the case, an unprofessional, disruptive and unruly employee could insulate her misconduct from disciplinary action simply by the filing of a frivolous EEO complaint. Title VII was never intended to produce such a result.

For these reasons, plaintiff's Title VII complaint will be **DISMISSED**.

Plaintiff's FOIA Claim for Attorney's Fees

Beginning in mid-2001, Roberts began requesting copies of the employee petitions, letters and/or memos which initiated the series of events which led to her temporary detail out of the operating room. These requests were directed to Gerber and copies were sent to various other VAMC officials. On October 31, 2001, Roberts renewed her request by specific reference to the FOIA and continued to request production of these documents through July, 2002. On February 21, 2002, the VAMC denied the request on the basis that the requested documents were "protected from disclosure under exemptions 5 and 6 of the FOIA . . ."[13] Roberts' appealed the agency decision to the VA general counsel on March 25, 2002. It is undisputed by the parties that the VA maintained its decision that the documents were not subject to disclosure through the time of the filing of Roberts' complaint herein on June 25, 2002. The disputed documents were provided to Roberts on

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[13] 5 U.S.C. § 552(b)(5) and (6) exempt from production under the FOIA certain intra-agency or inter-agency memoranda or letters and personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The VA has taken inconsistent positions with respect to whether or not it appropriately withheld the requested documents, arguing in one pleading it withheld the documents completely and appropriately pursuant to these exceptions but acknowledging in another pleading that the documents were provided after the designated official at VAMC realized she had misinterpreted the applicable rules. That really is of no consequence to this Court's decision on this issue.

or about August 19, 2002. The documents were provided after the designated official at the VAMC realized that she has misinterpreted the regulations. The error was apparently unintentional and was corrected by the production of the requested documents as soon as the error was realized.

"The Congressional policy behind the F.O.I.A. is to encourage public access to government information and to enable individual citizens to pursue their statutory rights by eliminating administrative barriers that could only be hurdled through expensive litigation." *Seegull Mfg. Co. v. N.L.R.B.*, 741 F. 2d 882, 886 N. 1 (6th Cir. 1984) (citations omitted). 5 U.S.C. § 552(a)(4)(E) provides:

> The Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

In determining whether to grant attorney fees under the FOIA, courts apply a two part test. *GMRI, Inc. v. E.E.O.C.*, 149 F. 3d 449, 451 (6th Cir. 1998). First, the court must "decide whether the plaintiff 'substantially prevailed' and is thus eligible for such an award. If so, [then the court must] determine whether the plaintiff is entitled to such an award based upon a balancing of equitable considerations." *Id.* Prior to 2001, a plaintiff need not have won a lawsuit or received a court order compelling the government to produce the requested documents. Instead, a plaintiff "will have substantially prevailed if it demonstrates that the prosecution of the lawsuit was reasonably

necessary to obtain requested information, and that the existence of the lawsuit had a causative effect upon the release of that information." *Id.* at 451-452. In *GRMI*, decided prior to *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources,* 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)(discussed below), the Court of Appeals for the Sixth Circuit found it irrelevant that a plaintiff "did not obtain a court order compelling the agency to produce the requested documents" since the lawsuit was a "catalyst" to the release of the documents. *Id.* at 45152.

The defendant contends that the plaintiff did not "substantially prevail" in her lawsuit and that Roberts has presented no evidence on the issue. Ordinarily, the better practice would be for this Court to hold an evidentiary hearing on this issue; *See Sargeant v. Sharp*, 579 F. 2d 645, 647 (1st Cir. 1978); however, the Court has sufficient information before it for a determination of this issue without an evidentiary hearing. The relevant facts are not in dispute. Under existing precedent prior to 2001, the plaintiff would likely have prevailed on her claim for attorney fees and this Court would have found that plaintiff had "substantially prevailed" because her lawsuit had at least some causative effect upon the release of the requested information. Under the current state of the law, however, such a conclusion is not at all as clear.

In *Buckhannon*, the Supreme Court rejected the "catalyst theory" and held that to "prevail" under the Fair Housing Act and Americans With Disabilities Act, a plaintiff must obtain a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon* at

605. The court stated that a "defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit lacks the necessary judicial imprimatur on the change." *Id.* "A plaintiff must receive at least some relief on the merits of his claim before he can be said to prevail." *Id.*

The Sixth Circuit has not yet specifically addressed whether the *Buckhannon* standard replaces the *GMRI* standard for analysis of fee awards in FOIA cases. The plaintiff argues that the Supreme Court's disapproval of the catalyst theory of attorney fees recovery is limited to awards under "prevailing party" attorneys' fees statutes such as 42 U.S.C. § 1988, where either the plaintiff or the defendant is allowed to recover attorneys' fees after a judicial decision in either's favor. Although *Buckhannon* was not a FOIA case, the Supreme Court did note that the federal fee shifting statutes should be interpreted consistently and referred to a list of such statutes, which included FOIA. *Buckhannon*, 532 U.S. at 598, 602-603, n 4 (citing to appendix to opinion of *Brennen*, J. dissenting in *Marek v. Chesney*, 473 U.S. 1, 43-51, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)). Since *Buckhannon*, two other circuits have applied its standard to FOIA cases. *See Edmonds v. Federal Bureau of Investigation*, 417 F. 3d 1319 (D.C. Cir. 2005); *Union of Needletrades, Industrial and Textile Employees, AFL-CIO v. United States Immigration and Naturalization Service*, 336 F. 3d 200 (2nd Cir. 2003); *Oil, Chemical and Atomic Workers International Union v. Department of Energy*, 288 F. 3d 452 (D.C. Cir. 2002). The Sixth Circuit has applied *Buchannon* to attorney fee awards in cases under 42 U.S.C. §§ 1983 and 1988; *See Dubuc v. Green*

Oak Township, 312 F. 3d 736 (6th Cir. 2002), *Chambers v. Ohio Department of Human Services*, 273 F. 3d 690 (6th Cir. 2001); *Hargis v. City of Cookeville, TN*, 92 Fed. Appx. 190 (6th Cir. 2004) (Not Recommended for Full Text Publication); and *Toms v. Taft*, 338 F. 3d 519 (6th Cir. 2003). At least one district court in the Sixth Circuit has held that the *Buckhannon* applies to awarding attorney's fees under FOIA. *See Auto Alliance International, Inc. v. United States Customs Service*, 300 F. Supp. 2d 509 (E.D. Mich. 2004).

Although it is true that *Buckhannon* involved the award of attorney's fees under a different statute than is at issue here, the United States Supreme Court expressly stated that all statutes that authorize attorney's fees to the "prevailing party" are to be treated consistently. Under the *Buckhannon* standard, a party prevails, and thus becomes eligible for attorney's fees, only where the party has obtained ***"a judicially sanctioned change in the legal relationship of the parties."*** *Id.* at 1840. (emphasis added). An award of attorney's fees is appropriate only where a plaintiff has obtained an "enforceable judgment" on the merits or a "court-ordered consent decree" but not under the catalyst theory, ***"which allows an award where there is no judicially sanctioned change in the legal relationship of the parties."*** *Id.* (emphasis added). Thus, this Court must conclude, as did the Supreme Court in *Buckhannon*, that the VA's "voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change." Based on this analysis, this Court rejects the catalyst theory as a permissible basis for awarding attorney's fees under FOIA and

holds that a "judicially sanctioned change in the legal relationship of the parties" is required before plaintiff can prevail on a claim for attorney's fees under FOIA. Applying this analysis to the instant case, plaintiff has not "substantially prevailed" in her FOIA claim against the defendant and her request for attorney's fees must be **DENIED**.

A separate judgment in favor of the defendant shall enter.

ENTER:

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT GREENEVILLE

NO. 2:02-CV-166

[Filed June 16, 2006]

NANCY H. ROBERTS	)
	)
v.	)
	)
ANTHONY J. PRINCIPI,	)
SECRETARY OF VETERANS AFFAIRS	)
	)

JUDGMENT

This civil action came on for trial before the Court, Honorable J. Ronnie Greer, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is **ORDERED AND ADJUDGED**

That the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant recover of the plaintiff his costs of action.

DATED at Greeneville, Tennessee, this _____ day of June, 2006.

s/Pat McNutt
Clerk of Court

APPENDIX C

EXCERPT FROM APPELLANT'S BRIEF

* * *

[p.3]

STATEMENT OF THE ISSUES

1. The District Court erroneously failed to apply this Court's Title VII imputed discriminatory/ retaliatory animus test to the undisputed material facts of Mrs. Roberts' case when it mistakenly concluded that the EEO-retaliatory animus of Nurse Manager Lori Hagen's supporters did not motivate the VA's decision to remove the plaintiff from her CRNA position.

2. The District Court erroneously concluded that the retaliatory personal and professional accusations against Mrs. Roberts were "compelling non-discriminatory reasons" which exonerated the VA from Title VII liability when the record showed that the VA had determined in 2002 that the accusations did not justify its having transferred Mrs. Roberts out of her CRNA position.

3. The District Court erroneously failed to consider the material and probative uncontradicted evidence of implied retaliatory animus.

* * *

APPENDIX D

EXCERPTS OF LORI HAGEN'S TRIAL TESTIMONY, JANUARY 18 & 19, 2006

* * *

[p.410]

LORI HAGEN, after first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. SMITH:

Q. Mrs. Hagen, because you weren't my witness yesterday I didn't ask you a lot of questions and you know that we're running out of time and I will try to be brief and I'm sure you will, too. Tell us about your education and your occupation, please, Ma'am.

A. I have a Bachelor's Degree in Nursing, an Associate Degree in Medical Coding, a Master's Degree in Health Administration. I'm Certified in the Or. I'm Certified in Quality Management.

Q. Are you an Officer in the Military Services?

A. I'm a Lieutenant Colonel in the United States Air Force.

Q. And during the Year 2001 were you a Major in any of the Military Services?

A. Yes, I was a Major in the United States Air Force.

Q. Air Force Reserve?

* * *

[p.423]

had enough of Nancy Roberts. And between the two reasons, that's why I sought the job.

Q. And you, and you made that decision way before you found out about this EEO Complaint?

A. Oh, correct.

Q. And you took a substantial pay cut to take this job, didn't you, Mrs. Hagen?

A. Correct. $12,000.00.

Q. And have you actually recovered that lost salary?

A. Some of it.

Q. Some of it, but Not All of it?

A. No.

Q. Okay. Did you lose a certain amount of prestige?

A. I don't think so.

Q. No? Everything was fine? When Mrs. Walter called you did she tell you don't mention this EEO complaint to anybody?

A. No, she did not.

Q. Did she tell you it was subject to any confidentiality restrictions?

A. No, She did not mention that.

Q. Okay. Now did this phone call

* * *

[p.430]

Your Honor. Talking about Deposition Testimony and Starting on a new line. This is . . .

THE COURT: Well, What's this about?

Q. There have been consistent allegations made by Mrs. Roberts that Mrs. Hagen is a lesbian. That she's a bad mother. And I think in all fairness she gets to tell what her children do. It would take a second about her kids.

MR. DEVAULT: Not at this time, Your Honor.

THE COURT: I don't see how it has any relevance to these issues. Sustained.

Q. Okay. Thank you. I have no further questions, Your Honor.

THE COURT: All right, Mr. Devault?

MR. DEVAULT: We have no questions, Your Honor.

THE COURT: Ms. Hagen, I have a couple of questions.

Examination by the Court:

Q. And I might have misunderstood

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you yesterday, but I understood you yesterday during your testimony to say that during that staff meeting in June when you announced that you had accepted another position that you made some reference to the complaint that was filed by Nancy Roberts being the last straw or something to that effect.

A. Uh-huh. (Yes)

Q. What I just heard you say is that it had absolutely nothing to do with your decision to take a new job. That you had made that decision and in fact accepted the job prior to ever learning about the complaint?

A. Correct.

Q. Will you clarify that for me? What did the reference to the last straw mean?

A. Well, I had said that quite a few times after major incidents to the staff about the last straw.

Q. Well, I'm only talking about that incident in June. June 12, I think you told me it was.

A. Because there was joking going on amongst the or staff about the allegations that I required my staff to call me major, so with the

* * *

[p.30]

Q. Ms. Hagen, would you state your full name, please, to the court, and address.

A. Lori Ellen Hagen, 1216 Gary Lane, Kingsport, Tennessee.

Q. You're Employed by the Va in what capacity, Ms. Hagen?

A. Right now I currently hold the position of Patient Safety Manager.

Q. In early 2001, what was your position?

A. The O.R. Manager, O.R. in PACU, Post Anesthesia Care Unit. It's the Recovery Room.

Q. As Nurse Manager in the Operating Room, how many Staff Nurses did you supervise?

A. The operating room had about sixteen people, and then the PACU had about four nurses.

Q. So you supervised 46 individuals. Forty-six, did you say ?

A. No, 16 in the o.r. and there was about 4 in the PACU.

Q. Oh, 16 and 4. All right. When did you come to the Mountain Home Va?

A. I came in 1998.

Q. Now, the nursing office where you were stationed is where, where in relation to the nurse anesthetist office.

A. When I was in the O.R.?

Q. Yes, Ma'am.

* * *

[p.36]

Q. But as far as any type of verbal inter -- exchange of the nature I just asked you about, and you said it didn't happen, where you called her evil or she called you evil, that didn't, that didn't happen; is that correct?

A. No, that did not happen.

Q. Now, you were burned out as the O.R. Nurse Manager, were you not, about that time?

A. I had had enough, and I was looking for a different opportunity.

Q. And, in fact, you had thought about leaving the O.R. the year before, but some of the surgeons had talked you into staying; hadn't you?

A. That's correct.

Q. And you applied for and interviewed for and accepted the position you have now, that of Patient Safety Manager, either in late may or the first week of June; is that correct ?

A. Yeah. I think I officially accepted it somewhere around June 9th.

Q. Well, do you recall in your deposition where you told us that you had already accepted it before June 9?

A. No, I -- I think in my deposition I said the first week in June.

Q. Okay. By the first week in June?

A. Yeah.

[p.37]

Q. All right, and you had interviewed for it in May; is that right?

A. It would have been somewhere the end of May, yes.

Q. Was -- were you concerned that you were not getting the support you thought you needed in the O.R. from your superiors?

A. It was just a difficult situation.

Q. But is that -- was that part of it?

A. Yeah, that would be part of it.

Q. Now, tell the court then what happened on the morning of June 9, 2001, with regard to a phone call from an EEO investigator named Barbara Walter?

A. Well, that wasn't June 9th, that would have been June 11th, and –

Q. Okay.

A. I got a phone call from a Barbara Walters who said she was from Washington, and she said there were some allegations that Nancy Roberts had contacted her with about me, I think there was three. Let's see, the first one, and she read them off, was Nancy Roberts stated that Lori Hagen had a staff meeting and required her staff to call her Major; and I started laughing, and I told her, that's ridiculous, that would be so easy to disprove; and I told her that she could ask any one of my staff members if she wanted, and that actually the person who had started that

[p.38]

was a Mabel Irwin, who's quite the jokester, and she had nicknames for everybody.

Q. And this is what you were telling the EEO Investigator as you were discussing Ms. Roberts' charges?

A. Yeah, correct.

Q. Now, had you -- did you know that prior to the phone call you got and your testimony today that it was June 11th?

A. I think it was June 11th.

Q. Okay. We've got documents saying 9th or the 11th, so June the 11th is fine. Were you aware that this same EEO Investigator had called Rachel Weston and Wanda Ibrahim in the CRNA office?

A. Was aware of that?

Q. Yes. Did you know that at that time?

A. No. She didn't tell me that.

Q. All right. You talked about the comment that, part of the charge where Ms. Roberts said that you wanted to be called Major and you thought that was a joke. What other allegations did you discuss?

A. The second one was that Nancy Roberts alleges that I was stalking her; and I remember asking the

EEO person, this Barbara Walters, what does that even mean? And she read off something about Nancy Roberts says that I am following her down the halls of the O.R. and stalking her;

[p.39]

and I just -- I wrote, I said to her that that's ridiculous, I would never do that to Nancy Roberts and there's no way she could find anybody in the O.R. that would even say that; and at that time Barbara Walters said something about, well, I haven't talked to Carolyn Harris yet. I said, well, that's fine, but no one will ever testify that I ever did that.

Q. Now, did the EEO investigator tell you that she was also looking at some information that had been filed in January, earlier in the year, over this incident with her complaint to Dr. Goulding over Ruben Fuentes and then your comment to her that she was causing him chest pains, was that mentioned?

A. Yeah. At the end of the conversation she brought it up. She said, well, Ms. Roberts had filed some EEO in January; and she said, weren't you aware of that? And I said, no, I wasn't; and she said, so you weren't aware of it? And she said, it must have got thrown out. I said, must have because I was never contacted and I have no knowledge of it.

Q. So I take it that Ms. Roberts had not told you during this period of time between January and June that she had filed charges against you?

A. No.

Q. and no one carried any rumors from Ms. Roberts to you

[p.40]

that she filed any charges against you?

A. No.

Q. And you were taken completely by surprise on June the 11th?

A. Well, I was because normally if somebody calls you and if it's truly an EEO complaint, you're supposed to get, you know, a notification that you're going to be interviewed by an EEO person; so I truly thought that Nancy had gone to Washington, D.C.. and contacted this Barbara Walters because Nancy had gone to Washington on some seminar, she had taken a government car and gone there; so I truly didn't even know it was -- if she had actually filed a formal EEO complaint or not because that's highly unusual you get a phone call out of the blue like that.

Q. You weren't, I guess, you didn't hear her correctly when Ms. Walter told you she was in Washington state?

A. No. She said she was from Washington.

Q. All right, and you understood that to be Washington, D.C.?

A. Yeah. Normally when you get a phone call from a VA person, you would automatically think Washington, D.C.

Q. All right. You hung up the telephone at the end of the conversation; is that correct?

A. Uh-huh.

Q. And then you walked out into the, what area, outside

[p.41]

your office?

A. I didn't do anything with the information right away.

Q. What -- when did you do something with that information?

A. Later on that afternoon when the cases were done when Ruben got out of his cases, I asked Ruben to come on into my office; and I asked Ruben if he knew anything about a January complaint that Nancy had made against us, and he said no; and I said, well, she said it must have gotten thrown out, so it must have gotten thrown out.

Q. So you discussed that it was an EEO charge against you and Mr. Fuentes with Mr. Fuentes?

A. Yes.

Q. When did you tell your staff that Mrs. Roberts had gone to Washington to file an EEO complaint against you and that that was the last straw?

A. That's not how it went.

Q. Well, tell me.

A. I had a staff meeting after June 12th, anyway, it was after I accepted it and it was after I met with the administration to see if I agreed to do joint -- they had Joint Commission coming up, and 50 percent of the Joint Commission Standards had to do with patient safety, so I had to decide if I really could take on both jobs with Joint Commission coming up, and I finally agreed because I

[p.42]

had the staff meeting the next morning because that's when we have our normal staff meeting at 7:00 in the morning; and I met with the staff, and I told them I accepted a new position. I explained the new position because it was newly created in the VA because they wanted to know what the position even entailed. I then told them that I'd be doing O.R. in the morning and in the afternoon I would switch over and go to a different office, my new office doing patient safety. I told them that they could be –I'd be on beeper or call me over in the office because I definitely would be covering both areas; and then they --then at the end of the meeting, that's when I said, I'm also going to ask you all to please not call me Major. Nancy Roberts has gone to Washington, D.C. and has asked – has complained that, that I asked you to call me Major. She said that,

and I told them about -- and her, Nancy had told this Barbara Walters that I had a staff meeting and that I required the staff to call me major. Well, of course, the staff -- there was some joking going on because it was such a silly allegation because when you have a whole crew sitting there, and, of course, it never happened, it was totally fabricated; and during that time -- and then I said, you just got to love it; and I said, that just kind of makes it the last straw; and you have to understand, this whole O.R. crew knew how Nancy

[p.43]

Roberts over a two year period, what she had, you know, done to me and a ton of other staff, so it was nothing new that I would be leaving. You can only take so much.

Q. So that was the first time you told your staff that you were resigning from the O.R.?

A. Correct.

Q. And you told them that Ms. Roberts going to Washington and filing a complaint against you was the last straw; is that correct?

A. No. I just said, you got to love. It's kind of like the last straw.

Q. And you're aware, are you not, that your staff was under the distinct impression that Ms. Roberts having

MS. SMITH: I object, Your Honor. She has no knowledge that her staff was under the distinct impression of anything. He can ask her what she was under the impression of.

MR. DEVAULT: She heard the talk.

MR. SMITH: Well, that's another question.

THE COURT: You can ask her specifically about what she heard, but rephrase your question. Sustained as to that question.

MR. SMITH: Thank you, Your Honor.

Q. Did you subsequently hear talk in the O.R. from your staff and the doctors that the speakers were under the

[p.44]

impression that Ms. Roberts having filed a complaint against you, EEO or not, had caused you to resign from your position as O.R. manager?

A. There was -- I think people were upset because I was leaving, I was the second nurse manager to leave, and so they were upset over that.

Q. And don't you know that they blamed Ms. Roberts for you leaving?

MR. SMITH: I object, Your Honor, again --

THE COURT: Sustained. Rephrase the question.

MS. SMITH: Thank you, Your Honor.

Q. Did you see any of the petitions that were subsequently circulated within a day or two?

A. No, I did not.

Q. But you knew there were petitions being circulated; did you not?

A. No, I did not.

Q. Nobody in your staff told you that they had a petition sitting out at the nurses' desk to be signed by any of the staff demanding that Ms. Roberts be looked into?

A. No, I did not.

Q. That she was creating a hostile work environment and harassing you?

A. No.

Q. Now, you stayed in the O.R. for six more months; did

* * *

[p.49]

MR. DEVAULT: We've premarked - -

THE COURT: 1 through 44?

MS. SMITH: 43, Your Honor.

THE COURT: And the only, only ones of those exhibits that are disputed are exhibits 23 and 40?

MS. SMITH: Well, so far, Your Honor. I think he also wants to get in Cynthia Chapman's handwritten notes, and I object to those too; but that's another witness.

THE COURT: I was going to try to speed the process up. Let's admit all these exhibits about which there's no dispute at one time and -- so that we can move on.

Q. Were you allowed to discuss your EEOC charge in front of the administrative board?

A. My EEO charge?

Q. The EEO charge against you by Ms. Roberts?

LOOK ON PAGE 16 OF 24.

A. Remember, this was March 11, 2002, and I wasn't even interviewed about an EEO actually formally, officially until I think it was June of 2002.

Q. Look on page 16 of 24.

I found it, Your Honor.

A. 16?

Q. Uh-huh.

A. Okay.

[p.50]

Q. Now, looking at page 16 and 17, does that refresh your memory that as you started to discuss your conversations about the EEO charges Ms. Roberts had filed against you, that Mr. Talley cut you off, especially on page 17, and stated that they couldn't -- you all could not discuss the EEO charge; that they could not look at that?

A. That's correct, yeah. It says right here that he's going to interrupt me, correct.

Q. So you were cut off from discussing about your EEO charge?

A. Correct.

Q. Did you include in your notes that you left with the AIB comments such as, to the effect that Ms. Roberts had been causing trouble in her church, trying to take over the congregation?

A. Did I testify to that?

Q. No. Did you leave that in your notes, did you have that in the notes you took to the AIB with you?

A. I had all my notes, so that might have -- yeah, that would have been in there.

Q. And you also had in those notes that she was considered a troublemaker in her neighborhood over a speed bump issue; is that correct?

A. All I had in my notes is what the staff told me.

* * *

[p.54]

asking that.

Q. Do you recall that?

A. Can you read it again?

Q. "Did your staff know when you, during the period of time that you were working on clearing all these deficiencies, that in fact you were going to be leaving anyway and going to be moving out of the o.r. management position?"

And you answered, "no."

And then I asked you:

"Q. And so the impression the staff got from your talk to them on the morning of, the morning you had that conversation with the EEO officer Barbara Walters was that Ms. Roberts' complaints were the last straw and that Ms. Roberts was the real reason that you were leaving?"

And you answered:

"A. Correct".

A. Yeah, that would be correct testimony because there was -- the staff had no knowledge for sure that I was going to find a position. It's very difficult in the VA, stay in the same VA to find a position, and this one just came open; so, yes, that's correct testimony.

Q. And you've already testified that the fact that she was reassigned, Ms. Roberts was reassigned, did not change your mind about staying in the O.R..; is that correct?

* * *

[p.64]

MS. SMITH: I have four exhibits, Your Honor. there's 11 and 12, which are Ms. Chapman's notes, they're cut into two pieces; and 23 and 40 you have conditionally admitted .

THE COURT: All right. Let's try to speed up then. Exhibits -- Plaintiff's exhibits 1 through 10 are all admitted. Plaintiff's exhibits 13 through 22 are admitted, Plaintiff's exhibits 24 through 39 are admitted. Plaintiff's exhibits 41, 42 and 43 are admitted.

Go ahead and provide during the break, Mr. Devault, the copies or the marked originals of those exhibits so that we don't and you don't have to bother with moving to admit them. When you get to 11 and 12, I'll take up the objection on that.

MS. SMITH: If it please the court, I don't know that Mr. Devault objects to mine; and in the same vein, since we're doing it all at the same time, I have exhibits numbered 44 through 58, if we wanted to admit them. Well, we can wait, Your Honor. Cancel that until my case in chief. I was --

THE COURT: But at the beginning of the defendants' case in chief, I'll admit all of those at once, Mr. Devault, unless there's an objection to it.

MS. SMITH: Thank you, Your Honor.

THE COURT: All right. Let's take about a ten

APPENDIX E

EXCERPTS OF DR. LOUIS CANCELLARO'S TRIAL TESTIMONY, JANUARY 19, 2006

* * *

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DR. LOUIS CANCELLARO, after first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. SMITH:

Q. Good afternoon, Dr. Cancellaro. You need to say hello and yes and goodbye. Every ...

A. Oh, I can say hello. Thank you.

Q. Every response needs to be verbal.

A. Okay. Hello.

Q. Thank you. Thank you, Dr. Cancellaro.

THE COURT: If all you want him to do is say hello and goodbye we can finish this real quickly.

A. I would be happy to do that.

Q. I'm afraid if I did Mr. DeVault would object and I'm leading the witness, as if I would ever be guilty of leading my witness. I can't imagine.

THE COURT: Go ahead.

Q. Dr. Cancellaro, would you give

* * *

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A. In all the time I spent at the VA the answer is no.

Q. Other than this case when you had to be deposed?

A. That's correct.

Q. Thank you. Have you ever retaliated against any VA employee for pursuing their rights under the EEO laws?

A. No.

Q. Did you retaliate against Mrs. Roberts for pursuing her rights under the EEO laws?

A. No.

Q. Okay. Now did you know when Mrs., let's go back a little bit. What caused, what facts led up to the, the meeting on June 27th, 2001?

A. Well, I received a, a couple of memos that were not sent directly to me. They were carbon copied to me, so they were not sent directly to me. And whenever there is a memo that has to do with personnel in the medical side of the hospital, then of course I would get a copy of it. And if it was something that had to do with a clinical service, then I would be the one responsible for doing something about it. And one

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particular memo that concerned me a great deal was when I had a memo signed by 11 surgeons and this was disconcerting because the scuttlebutt in the hospital was that the surgeons were, would split the hospital. Now you have to understand, in the VA there were only two surgeons who were full time employed. The remaining surgeons are part time, five 8's, six 8's, seven 8's. They work with the medical school. So they could very easily pull out of the hospital and I would have a decimation of the surgical service, which would impact profoundly upon medical care.

Q. Okay. So you got the memo and then what happened?

A. Well, when I got that memo I decided that something had to be done about this. I needed to find out what was going on and since I don't go around making individual investigations because I am in the senior position where I have to make a decision about something, so how do you investigate your own thing and then make a decision? There would be a lot of biases associated with that. So what I did was is I first

wanted to set up the process for a Fact Finding Board. I shouldn't use the word board. It's a

* * *

[p.348]

come in five minutes?

A. In essence.

Q. And she's about a quarter mile away, isn't she?

A. Well, she took her time, but, we allow for that. They have a cart that came from the personnel building that drove over to the main part of the hospital that made the timeframe a little bit easier for them. But the telephone was always there and sometimes you could solve things on the phone.

Q. At the time that you decided to detail Mrs. Roberts on June 27th, 2001, were the reasons provided in the petitions that you received copies of, were those sufficient to warrant the personnel decisions that you made?

A. I think so. I think if you have disruption in the OR which has to function as a team and when particularly you have the captains of the team, namely the surgeons, who really make their likelihood in their OR, you know, if that's disrupted then something needs to be addressed. And it can't wait.

Q. I know it's been awhile since you looked at it, but I'm going to show you the

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APPENDIX F

EXCERPTS OF DR. JULIE DUNN'S TRIAL TESTIMONY, JANUARY 18, 2006

* * *

[p.255]

Accommodate Dr. Dunn, she's here, we would call her; but she may be some time, so I don't know what Your Honor feels like today.

THE COURT: All right. Ms. Smith, do you know whether she's here or not?

MR. SMITH: She's here.

THE COURT: Let's try to accommodate her schedule and get her done today.

I'm still looking for Dr. Dunn, is she here?

MS. SMITH: she went to get her -- I'm sorry, Your Honor. She may have had trouble getting into my office.

THE CLERK: just come this way, please.

Julie Dunn, plaintiff's witness, sworn

MR. DEVAULT: could the clerk give the witness Exhibit number 1 and number 18.

DIRECT EXAMINATION

BY MR. DEVAULT:

Q. Good evening, Dr. Dunn. How are you?

A. Okay.

Q. Would you state your full name and address, please, to The Court.

A. Julie A. Dunn, M.D., 1110 South West Avenue, Johnson City, Tennessee.

Q. And how old a lady are you?

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A. Excuse me?

Q. How old are you?

A. Forty-seven.

Q. And what is your profession?

A. I am a medical doctor.

Q. Are you a surgeon?

A. Yes, sir.

Q. And what kind of surgery?

A. I do general and trauma surgery.

Q. General and what kind?

A. Trauma.

Q. Trauma. And by whom -- are you currently not working for the VA?

A. No, I am not. I work for East Tennessee State University.

Q. And in what capacity?

A. As a associate professor of surgery.

Q. Was there a time that you worked for the VA?

A. Yes.

Q. And when was that?

A. I was a resident at the VA, graduated in 1998 and went on faculty at ETSU and worked at the VA from 1998 to January 1, 2004.

Q. During that period of time you were at the VA operating as a surgeon how many hours or days out of each

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week?

A. When I very first started at the VA, I was 5/8's time, which was 5 days and 40 hours; and it was a variable term of duty while I was there. I dropped to 3/8's probably a year, under a year and a half before I quit the VA altogether.

Q. Now, you were familiar and knew Ms. Lori Hagen, the O.R. Nurse Manager; did you not?

A. Yes.

Q. And thought a lot of her?

A. Yes.

Q. And I take it you and some of the other surgeons were especially grateful to her because the operating room there seemed to be better organized after she became the O.R. Nurse Manager; is that correct?

A. Yes.

Q. Did you also know Ms. Nancy Roberts, the CRNA?

A. Yes.

Q. Now, prior to, prior to your involvement in the petition that's Exhibit number 1, had you ever had occasion to make any complaints to anyone about Ms. Roberts' behavior or her professional expertise?

A. No.

Q. Did there come a time when you became aware from your conversations with, say just with anybody, that there was

[p.258]

any type of antagonism or hostility between Ms. Lori Dunn and Ms. Nancy Roberts?

A. Lori Hagen --

Q. Excuse me.

A. - - you mean?

Q. Ms. Lori Hagen and Ms. Nancy Roberts.

A. At some point in time I became aware that there had been some complaints about Lori from Ms. Roberts and that Lori had made a decision to leave our service as a result of that.

Q. Now, looking at June 2001, if you look at your petition -- I call it your petition, you drew this petition, Exhibit 1; didn't you?

A. Correct.

Q. and it's dated June 14, 2001. So I take it at some point in time before that, you became aware that a complaint had been filed against Ms. Lori Hagen by Nancy Roberts; is that true?

A. Some type of complaint.

Q. And who told you that?

A. I don't recall.

Q. Did you have a conversation with Ms. Lori Hagen about the fact that Ms. Roberts had filed a complaint against her and that she had -- it was the last straw and she had decided to leave the O.R.?

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A. We had a discussion. I found out that she had decided to leave the O.R. because of a lot of hostility; and she felt that there were other things that she could do, so she opted to move on.

Q. And was that before you drew this petition up?

A. Yes.

Q. Exhibit 1?

A. Yes.

Q. And how long before that?

A. I couldn't recall exactly, but probably within several weeks.

Q. And, in fact, during your deposition you told me that Ms. Hagen told you that she had had a hostile work environment charge filed against her by Nancy Roberts; is that correct?

A. I believe -- I don't recall the exact wording. I know that she said she had had a complaint filed against her, and I don't recall specifically if it was a hostile work environment or -- I believe it might have been, but really my memory doesn't go back that far.

Q. Did Ms. Hagen tell you that that was the last straw?

A. She basically felt that she didn't need to work under that kind of harassment and that type of environment, yes. I don't know if the words exactly were "the last straw"; but in effect, yes.

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Q. Now, did she also tell you, Ms. Hagen tell you that there were other concerns, that she had some disappointments with regard to the lack of support she got in the O.R. area as one of the reasons for her leaving?

A. She said there were a multitude of reasons; but this was -- yes, she said there were a multitude of reasons.

Q. And I believe you told me during the deposition that the reason you didn't put these other reasons in your petition was that these other reasons were not the final straw; is that correct?

A. Correct.

Q. And you told me during the deposition that since the complaint by Ms. Roberts was the final straw that

had caused Ms. Hagen to leave, that you thought by drafting this petition for her, that it might make a difference, but in the end it did not; is that correct?

A. Correct.

Q. When you, when you drafted -- well, did you draft this by yourself?

A. I drafted it after a discussion with several of the surgeons in the operating room; but I wrote the letter myself, yes.

Q. Were the other surgeons that you were talking with under the impression that Ms. Roberts having filed a complain against Ms. Hagen, with whomever, was the final

[p.261]

straw and had caused Ms. Hagen to resign from the O.R.?

A. Yes.

Q. Had you talked with Rachel Weston or any of the CRNA's before you drew up this petition?

A. I don't recall doing so, no.

Q. Do you recall whether Ms. Hagen confided in you that she had talked with an EEO counselor about these complaints and charges?

A. No.

Q. The petition states, to whom it may concern: it has come to our attention that a complaint has been filed against Ms. Lori Hagen, O.R. Nurse Supervisor. We are sending this letter in support of Ms. Hagen and feel the complaint -- and I think it says, to be one of harassment; is that right? The stamp is over it; but since you drew it, did I interpret it correctly?

A. I believe that is the word there, yes.

Q. And then the rest of the paragraph goes on to compliment Ms. Hagen on her management skills; does it not?

A. Correct.

Q. And then the last paragraph states, I urge you not only to investigate the complaint that has been filed, but to search the background of the individual filing this complaint for further insight into the real source of the problem. Now, by that did you mean that Ms. Roberts was

[p.262]

the real source of the problem?

A. Yes, I did.

Q. Now, had Ms. Roberts done anything to you personally?

A. No, sir.

Q. Had you ever seen her be rude or impolite to any other surgeon or any other staff member?

A. No.

Q. Had you ever seen her be abusive or rude to a patient, you yourself, had you seen that?

A. No.

Q. How many of these other doctors did you convince to sign this petition yourself personally, did you talk to each one of these signatories on the petition?

A. No, sir.

Q. You did talk to Dr. Battle; did you not?

A. I believe we talked to a group of surgeons. I don't recall who, I don't recall who was in that particular group at the time. I know there was a great deal of dismay about Lori Hagen's decision, and we felt that something needed to be done about it. I don't recall exactly who that group of individuals was at the time.

Q. And how long did this petition circulate, how many days?

A. One, to my knowledge.

Q. And what did you do with it, what did you do with the

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petition after you had these signatures on it?

A. I sent it to Dr. -- well, I think I sent it to Dr. Gerber.

Q. You have a list of addressees, medical center director, that would be Dr. Gerber?

A. Yes.

Q. Labor relations specialist, was that Patsy Fish or was that somebody else?

A. I wouldn't know. I wouldn't know.

Q. Okay. The Chief of Surgical Services.

A. That was probably Dr. Knight at the time.

Q. Okay. The Chief of Anesthesia Services.

A. That is Dr. Goulding, or was Dr. Goulding.

Q. Okay, and then what is ACMD/PCS?

A. I don't recall now.

Q. And then the President of the Union; is that correct?

A. Correct.

Q. You did not give a copy of this petition to Ms. Roberts?

A. No, sir.

Q. You did not talk to Ms. Roberts about the petition?

A. No, sir.

Q. You knew that how many other petitions were being circulated?

A. I believe I knew the nurses were also distressed by

[p.264]

what was going on because she had been a good manager; that's the only one I knew about.

Q. Do you know who told you about that?

A. No, I do not recall.

Q. I believe you told me in your deposition that Ms. Hagen also confided in you about a portion of Ms. Roberts' complaint about being called major?

A. I do know that that was a portion of the complaint, and I'm not sure who -- it must have been Lori -- that that was in the complaint; but, yeah.

Q. Well, did anybody else talk to you about the details of what had been in Ms. Roberts' complaint about Ms. Hagen?

A. No, not that I recall.

Q. And I believe you told me on page 38, you stated.

"A. I knew about the major charge I think.

"Q. And how did you know that?"

And you stated:

"A. Because when Lori and I talked, she said that was one of the complaints, that we were required -- her staff was required to call her major."

So it did come from Ms. Hagen; did it not?

A. I believe so.

Q. Did you personally see any impact on patient care that you would attribute to Ms. Roberts, did you personally observe any?

[p.265]

A. No.

Q. Now, there came a time after Ms. Roberts had been detailed out to the emergency room that you wrote another correspondence to Dr. Cancellaro, and that's Exhibit 18, your memo of January 3, 2002. Do you have that before you?

A. Yes, I do.

Q. How did you become aware that Nancy Roberts might be reassigned to the O.R. area?

A. I don't recall how I became aware of that.

Q. Did you personally talk with Dr. Louis Cancellaro about the fact that since he didn't have any more on Ms. Roberts than the fact finding board had found, that he was going to have to send her back to the O.R. unless somebody came up with something else on her?

A. I don't recall that type of discussion, no.

Q. Well, what prompted you to write this letter then?

A. I understood that she would be -- she may be reassigned. I didn't know if that was fact or not, but I had a concern that she would be reassigned; and Dr. Cancellaro did say if I had a concern. To send him a letter, which I did.

Q. So at some point you did talk to Dr. Cancellaro about her?

A. Yes.

Q. Tell me about when that conversation happened, was it

[p.266]

In December of '01?

A. It was around the time of this memo, but I couldn't tell you exactly when.

Q. Did you talk to him in a hallway, in his office, in the O.R.?

A. It, it was not in the O.R., but I can't recall where it was. He rarely comes down to the O.R.

Q . Did you seek him out?

A. No, I did not.

Q. This was said in passing?

A. Correct.

Q. Who brought it up?

A. I believe I did.

Q. You had heard from someone else that she might be coming back; and so when you saw Dr. Cancellaro, you said, is Ms. Roberts going to come back to the O.R.?

A. Something to that effect.

Q. Something like that. He told you something like, I'm going to have to send her back until I -- unless I get more on her?

A. No. I don't recall that he said that.

Q. How did he phrase it?

A. I don't recall our conversation. I recall that I expressed some concerns about her returning; and he said, if you've got concerns, send me a memo.

[p.267]

Q. All right. Well, let's look at your memo then. It has come to our attention, you used the, the plural, I guess, the regal; but you're the only one that sent this, aren't you?

A. Correct.

Q. It has come to our attention that Nancy Roberts, CRNA, may be placed back in surgical service in the immediate future. The below signed, but I don't see any signature. Did you have any signatures?

A. No, apparently not.

Q. The below signed --

A. I don ' t see any.

Q. -- have grave reservations about this action to such an extent that we would not allow our patients to be placed under her care. Well, I take it that "we" is you; is that correct?

A. Well, I guess I was basing it on my previous memo when we had other concerns. I don't really recall.

Q. Now, you've also testified though, as a matter of fact, you personally didn't have any problems with Ms. Roberts' competency or her behavior when you were the surgeon in the operating room?

A. When I was the surgeon in the operating room, yes.

Q. No problems?

A. Correct.

[p.268]

Q. Ms. Roberts' behavior is disruptive, divisive and lacks professionalism. Now, was this based on what other people told you?

A. This was based on the events and morale and issues in the O.R. during that time frame, time, during that time frame.

Q. But nothing that you observed when you were operating?

A. I never saw anything directly done in front of my face, no.

Q. On one occasion when an unstable patient with a gastrointestinal bleed required surgery, she refused to monitor the patient while the staff set up the

operating room. Now, was that based on what other people told you?

A. Correct.

Q. Did you check any records independently to see if this happened?

A. No.

Q. Do you know who told you that?

A. I believe it was one of my partners, but I don't recall which partner that was.

Q. And then the next line, excuse me, on another occasion during an ophthalmology procedure, the wrong eye was blocked Ms. Roberts falsified the record, prompting an extensive investigation. Was this something someone

[p.269]

told you?

A. Correct, yes.

Q. You didn't observe it yourself?

A. No.

Q. On several occasions she has left patients um)er the care of other CRNA's so she could take a break. To their chagrin and at risk to the patient, the needed drips were not prepared that would generally be

required intraoperatively. I take it since nothing happened in your room, that that was based on what you heard other people say ?

A. Correct.

Q. Do you remember who told you that?

A. No, I do not.

Q. Did Ruben Fuentes give you any of that?

A. I don't recall.

Q. In another incident the status of available blood products was not known. And, again, that's second or third hand; is that correct?

A. Correct.

Q. We have lost several excellent nurses from our service due to Ms. Roberts' actions. Given her hostile actions and the above incidents, we are not comfortable with Ms. Roberts' level of professionalism and would not entrust our patients to her care.

[p.270]

Now, besides Ms. Hagen, who did you blame leaving on Ms. Roberts?

A. Julia Bruce, I believe, left O.R. under great distress.

Q. Did you personally observe that?

A. I was there the day that she left and went to the ER --

Q. You don't know what her --

A. -- to be evaluated.

Q. You don't know what her physical condition was; did you?

A. I didn't see it with my own eyes, no.

Q. You don't know what she was diagnosed with having later on?

A. No, sir.

Q. Excuse me?

A. No, I don't recall.

Q. Given her hostile actions and the above incidents, we are not comfortable. Now, the above incidents are the ones we've talked about that you got second or third hand, but the hostile actions, what are the hostile actions?

A. Well, there was disruption in the O.R. there were morale issues. There was a nurse -- this was not the first nurse that left the PACU under these types of conditions. Another nurse I think left, did not file any type of

[p.271]

complaint, but just moved to a different unit.

Q. Now, again, is this something you were told?

A. Yes, sir.

Q. You did not observe it firsthand?

A. Well, I know for a fact that Julia Bruce did leave --

Q. Right.

A. -- and went to the emergency room.

Q. As far as the actual reasons, second or third hand; is that right?

A. Correct.

Q. Can you tell me -- and so be above board about this, these are Ms. Julia Bruce's notes that were given to the AIB, and I want -- if you, if you can tell me because I don't know, here it states that in August 2001, several months after she left the VA, she was diagnosed with Ehlers-Danlos Hypermobility Type. Do you know what this is, can you tell us?

A. Well, it's a connective tissue disorder; but, no, that's not my area of expertise or practice. It's very rare. I really know very little about it.

Q. But it is an actual physical ailment?

A. Yes.

Q. And the note says, this explains the fatigue, joint pain, achiness and why it is worse with stress. Are those the symptoms, if you know?

[p.272]

A. I don't know.

Q. Between, between the time you wrote, wrote these two Exhibits -- excuse me, Your Honor. Between the time you wrote Exhibit 1, the petition in June 2001, and the time you wrote this January letter, did you get this new information that you put in your memo to Dr. Cancellaro to help him convene an AIB or had you known -- had you heard that earlier, had you heard that at the time you wrote the petition, just didn't put it in?

A. I don't recall.

Q. Now, if I may refresh your memory, perhaps, Dr. Dunn. From your deposition, I quote here on page 85, on several occasions left the patients under the care of other CRNA's so she could take a break, et cetera, the drips not being approved and so forth.

"Q. Do you remember whether it was Rachel Weston or Fuentes?

"A. No.

"Q. Was this any new information you had received since the petition?

"A. No."

So on at least that part of it, that was not new information; is that correct?

A. It would appear so.

Q. Did the VA replace Ms. Roberts with another CRNA?

[p.273]

A. I don't recall at this point.

Q. You don' t remember?

A. I don' t remember.

Q. Now, did you try to talk Ms. Hagen into staying after Ms. Roberts left?

A. I don't, I don't recall. I know that I, I – all of us really wanted her to stay, I wanted her to stay as well. She was a very good manager. Whether I tried to talk -- I tried to talk her into staying any time as long as she was leaving, but I don't recall any specific notations about or any discussions about, after she left about asking her to stay.

Q. And I believe you also told me on the, during the deposition at page 68 that you personally had never seen Ms. Roberts intimidate anyone; is that correct?

A. I had never seen -- I don't sit around watching people interact with other people. I couldn't in -- I do my job.

Q. Were you pleased that your petition had the impact that it had on the VA administration and Ms. Roberts was removed from the O.R. area?

A. I know that when she was removed from the O.R. area, the morale was considerably better, the work processes appeared to go smoother and the dissension that seemed to be caused by her presence was gone.

* * *

[p.285]

Honor. Dr. Dunn is not qualified as an expert on this personnel management.

THE COURT: I understand the burnout. I understand stand the point, the burnout.

MS. SMITH: Okay. Thank you, Your Honor. No further questions.

Thank you, Doctor.

THE COURT: Any redirect, Mr. DeVault?

MR. DEVAULT: Just very briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. DEVAULT:

Q. I believe that Ms. Roberts phrased a question that dealt with you hearing this scuttlebutt in the O.R. and then you talked with Lori Hagen.

A. Ms. Smith, you mean?

Q. I wrote down scuttlebutt, I think it was scuttlebutt about people being upset with Ms. Roberts or whatever, and then you talked with Ms. Hagen.

MR. SMITH: I'm sorry, Your Honor, I don't understand the question, and I'm sure the witness doesn't either.

Q. What I'm trying --

THE COURT: Rephrase your question.

Q. You talked to Lori Hagen sometime before you wrote that June 14th petition?

[p.286]

A. Yes.

Q. A day or two before; is that correct?

A. I couldn't give you the time frame.

Q. Okay. How long had you heard rumors, complaints, scuttlebutt about Ms. Roberts causing Ms. Hagen problems before you actually talked to Ms. Hagen about it?

A. I believe what caused me to talk to Ms. Hagen was that she said she was leaving because of these issues.

Q. That's what caused you to talk to her?

A. Yes.

Q. You didn't talk to her because you had heard anything else?

A. I don't recall.

Q. All right. Now, you knew that having a physicians' petition, one drafted by physicians and signed by physicians, that stated that they weren't going to send patients to the O.R. if Ms. Roberts were there would have a terrific impact on the VA administration; did you not?

A. I don't recall that this memo says that.

THE COURT: I think it's the January memo that makes reference to the patients.

MR. DEVAULT: Excuse me, you're right, Your Honor.

Q. Your January memo, the other Exhibit, Exhibit number 12 -- excuse me, number 18.

[p.287]

A. I don't believe we threatened to withhold patients from the VA O.R. in this, even in this memo.

Q. Well, it says, would not entrust our patients to her care.

A. Correct; but that does not imply that we're going to stop all operative services at the VA.

Q. That wasn't the intent of the memo?

A. No, sir.

Q. Now, you also stated that you saw that the work flow improved after Ms. Roberts left?

A. Correct.

Q. And how did you measure that, were any studies done?

A. No, sir.

Q. Is that just what you're saying today or did you actually have anything objective to base that on?

A. Basically you come to an O.R. and things are running smoothly and cases are going on time and there's no complaints about who did this or who did that and things worked good, the morale was good, people seemed calmer, easier. It's a general sense of feeling more than a study, I suppose. I didn't do a study, but it was just a general sense that things had smoothed out.

Q. So that the individuals that signed the petitions against Ms. Roberts were happier and so, therefore, everything ran smoother; is that what you're saying?

[p.288]

A. Oh, I don't know who signed -- which petition are you discussing?

Q. Well, any of them. In other words, I'm trying to determine how you measure, how you quantify your, your statement that, oh, everything ran better, everything was smoother, the cases went faster.

MR. SMITH: Objection, Your Honor. He's arguing with the witness.

Q. I'm asking you how you quantify that.

A. Subjectively, or -- subjectively.

Q. And, of course, you were pleased that your petition had, had resulted in Ms. Roberts being removed from the O.R.; weren't you?

A. No, I was pleased that my petition resulted in the O.R. running more smoothly, less disruption.

Q. And the intent was to have Ms. Roberts removed from the O.R.; was it not?

A. Pardon?

Q. And your subsequent memo of 2002 was intended to keep her from coming back to the O.R.; was it not?

A. Yes, it was.

MR. DEVAULT: that's all I have, Your Honor.

THE COURT: Any recross?

RECROSS EXAMINATION

BY MS. SMITH:

[p.289]

Q. Just one question that Mr. DeVault asked you. You had no expectation whatsoever that Dr. Cancellaro, that your memo or petition would have any impact on Dr. Cancellaro; did you?

A. No.

Q. In fact, you had every expectation that it would have absolutely none; didn't you?

A. It's been my experience in the past that that has been the case.

MR. SMITH: Thank you.

EXAMINATION

BY THE COURT:

Q. Dr. Dunn, I invited the lawyers to ask these questions, but they didn't, let me ask you.

A. Okay.

Q. You stated some opinions earlier, one of your opinions were that Nancy Roberts disrupted the operating room at the VA. What do you base that on?

A. I base that on general workload discussion with nurses in the PACU, one who had left, one who had left in distress or under stress; work flow among the CRNAs apparently was disrupted again. I guess the word that was used here was scuttlebutt, but it was very disruptive to their daily management.

Q. Was that an observation you made before or after you

[p.290]

learned of Nancy Roberts' complaint about Lori Hagen?

A. We're going back, I believe that's something I knew before, but that the Lori Hagen event was somewhat, was the final straw.

Q. All right. Same question with respect to your opinion that Nancy Roberts created a morale problem in the operating room. Did you make those observations before or after you learned of this complaint?

A. They were before, to my recollection.

Q. All right, and is that also the case with respect to your opinion that Nancy Roberts created stress in the operating room that in your opinion was

counterproductive as far as patient care was concerned?

A. Yes.

Q. All right. Did you ever document any of those concerns or call them to the attention of VA administrators prior to learning of this complaint?

A. No.

THE COURT: all right. Anything else?

MR. DEVAULT: let me just ask her along those lines, Your Honor, so that I'm clear.

REDIRECT EXAMINATION

BY MR. DEVAULT:

Q. You've testified to the, to The Court that you observed morale problems in the operating room, but there

[p.291]

were no morale problems in your operating room; were there?

A. I, I have to think.

Q. Well, you didn't --

A. I mean --

Q. There was -- nothing stands out in your mind as being a morale problem?

A. Nothing stands out in my mind, no.

Q. And you testified that there was stress in the operating room because of Ms. Roberts; but in your operating room when she was there, there wasn't any additional stress; was there?

A. I focus when I'm in my operating room; and so if there was stress, I didn't observe it directly. I focused on my case.

Q. Had, had Ms. Roberts been causing a problem in your operating room, you had the authority to report her to the VA administration; did you not?

A. Yes.

Q. And you didn't; did you?

A. No.

THE COURT: Dr. Dunn, thank you very much. You may be excused.

All right. We don't have any doctors waiting out in the hall waiting to testify today; do we?

MR. DEVAULT: No, Your Honor. I think it's a

* * *

APPENDIX G

PLAINTIFF'S EXHIBIT

CASE
NO. 2:02-cv-166

EXHIBIT
NO. 1

June 14, 2001

To Whom it May Concern:

It has come to our attention that a complaint has been filed against Ms. Lori Hagen, OR Nurse Supervisor. We are sending this letter in support of Ms. Hagen and feel the complaint is one of harassment. Ms. Hagen has been a nursing supervisor in our Department for several years. During that time, the efficiency of the Surgical Service has improved dramatically. Ms. Hagen is efficient, thorough, and perhaps most importantly, fair. In our collective experience (spanning more than 15 years), the Surgical Services have never been better managed. In all encounters with Ms. Hagen, we fell she has handled sensitive issues quickly and professionally. When problems are encountered, she never hesitates to jump in and assist.

Because of this incident, and others like it, Ms. Hagen has decided to leave our Service, must to our dismay

and the dismay of those she supervises. We cannot idly stand by and watch the continual harassment that she and others have had to endure – much to the detriment of the Surgical Services.

I urge you not only to investigate the complaint that has been filed, but to search the background of the individual filing this complaint for further insight into the REAL source of the problem.

Medical Center Director – 00
Labor Relations Specialist – 00L
Chief of Surgical Services – 112
Chief of Anesthesia Services – 112A
ACMD/PCS - 002
President AFGE - AFGE

/s/ Julie Dunn MD
/s/ Floresguerra
/s/ J W Battle
/s/ Sue McCoy
/s/ Diane Cobble MD
/s/ Daniel Rush
/s/ Judson C. McGowan MD
/s/ J. Holbrook MD
/s/ Daniel Haynes MD
/s/ Calvin Morgan MD
/s/ Barbara Kimbrough
/s/ Tony Katras

APPENDIX H

PLAINTIFF'S EXHIBIT

CASE
NO. 2:02-cv-166

EXHIBIT
NO. 3

6-13-01
Ruben Fuentes C.R.N.A.
Cathy Jo Hunt C.R.N.A.
Wanda Ibrahim C.R.N.A.
Rachel Weston C.N.R.A.

Dr. Goulding, Dr. Knight, and Dr. Gerber

In light of the recent events involving our department and the surgery staff, we feel we must speak out about our co-worker, Nancy Roberts C.R.N.A.

We feel we are in a very hostile and stressful environment Ms. Roberts has filed numerous complaints which have no basis in reality and in fact are pure fiction (i.e. Lori Hagen stalks her, demands OR personnel address her as Major, etc-the list goes on and on).

We, along with Lori Hagen, feel that we are not safe in our work environment. Ms. Roberts does retaliate,

confabulate, and intimidate to obtain her goals (i.e. my husband will be seeing Dr. Gerber over my working late-I'll file a harassment charge, etc. again, the list goes on and on).

Could someone please deal with this irrational behavior in the workplace? What becomes of the employees who are cooperative and professional? Are we without rights?

We would prefer not to pursue this with a formal complaint regarding this consistently hostile workplace, however we feel threatened and endangered. This cannot help but effect patient care eventually.

We will anxiously await your response.

Sincerely,

Ruben Fuentes C.R.N.A.
/s/
Cathy Jo Hunt C.R.N.A.
/s/
Wanda Ibrahim C.R.N.A.
/s/
Rachel Weston C.R.N.A.
/s/

APPENDIX I

DEFENDANT'S EXHIBIT

CASE
NO. 2:02-cv-166

EXHIBIT
NO. 50

Department of Veterans Affairs **Memorandum**

Date: May 16, 2002

From: Chairperson, Henry C. Talley V, Chief CRNA, VAMC, Memphis, TN
Board Member, Marianne Cbick, AA/COS, VAMC, Lexington, KY
Board Member, Linda Salansky, CRNA, VAMC, Louisville, KY

Subj: Administrative Investigation of Operating Room and Anesthesia Services at VAMC, Mountain Home, TN

To: Medical Center Director (621/00), VAMC, Mountain Home, TN

Thru: Chief, QM&IS (621/00Q), VAMC, Mountain Home, TN

1. PRELIMINARY STATEMENT: The Administrative Investigation Board (AIB) has completed its investigation as directed your memorandum dated March 2, 2002, as amended.

2. SCOPE: This investigation was convened to inquire into the facts and circumstances regarding multiple allegations of improper behavior by a Certified Registered Nurse Anesthetist (CRNA) in repeated instances during 2001 in the OR suites. Surgeons, nurse anesthetists, and OR nurses, signed letters of complaints and subsequent communications with the Chief of Staff indicate that concerns subsequently existed that a hostile environment may have impacted patient care. The Medical Center Director, VAMC, Mountain Home, TN, as the convening authority, asked the AIB to provide a copy of this report of investigation when completed. The Medical Center Director has also requested that the AIB refrain from investigating alleged EEO complaints, which are being investigated separately, thus the alleged EEO complaint is not within the scope of the present investigation.

3. SIGNIFICANT PROCEDURAL ISSUES:

a. Prior to the arrival of the AIB, during the week of March 3, 2002, several messages were exchanged between Ms. Nancy Roberts and Ms. Norma Swanson. Ms. Swanson forwarded to the AIB chairman a list of names Ms. Roberts wished to be interviewed regarding the subject of this investigation. The AIB chairperson found that all of the persons listed did not possess information material to this investigation; however, those that were listed, who had a direct relation with

Ms. Nancy Roberts during the time period and place, and believed to possess information material to this investigation were allowed.

b. On March 13,2002, Ms. Nancy Roberts, CRNA, VAMC, Mountain Home, TN, informed the AIB that she wished to present statements regarding the subject of this investigation. After careful review of the presented statements, the AIB found that they did not possess information material to this investigation.

c. On March 13, 2002, it was requested that representatives be allowed to attend certain witness interviews on behalf of the employees being interviewed. These requests were permitted after consultation with AIB members.

4. FINDINGS OF FACT:

a. The relevant laws and regulations applying to the obligations and rights related to this investigation may be found in VA Handbook 0700, Administrative Investigations.

b. Ms. Roberts has served as a staff CRNA, Anesthesiology Section, Surgical Service, at the James H. Quillen VA Medical Center, Mountain Home, TN, since December 8, 1996 through the present. Her immediate supervisor has been Dr. Clarence Goulding, Chief Anesthesia Section since December 8, 1996.

c. Throughout the period investigated, Ms. Roberts' scheduled tour of duty was 8:00 a.m. to 4:30 p.m., Monday through Friday, and her official duty station

was James H. Quillen VA Medical Center, Mountain Home, TN.

d. On June 13, 2001 a petition signed by several members of the CRNA staff stated that they felt that they are not in a safe workplace. Comments contained in that petition included ".... I'm concerned for Lori Hagen and myself and our safety ... as we appear to be her primary focus."

e. A second petition signed by 26 perioperative employees was entered as evidence describing Nancy Roberts as "the ultimate bully and maintains her reign of terror by intimidation."

f. A third petition dated June 14, 2001 signed by 12 physicians addressed problems surrounding the transfer of the nurse manager of the operating room, Lori Hagen. They asked to get to the "real source of the problem."

g. Effective June 27, 2001, the Chief of Staff, Louis A. Cancellaro, Ph.D., M.D., detailed Ms. Roberts as a staff nurse in the emergency room under the supervision of Nursing Service, pending the results of a fact-finding board.

h. The Medical Center Director was advised in a July 18, 2001 Advisory Opinion from the Administrative Fact-Finding Board, in response to his request for advice, that management must take immediate steps to stabilize the operating room working environment before harm comes to patients treated there.

i. The Chief of Staff extended the detail of Ms. Roberts as a staff nurse in the emergency room under the supervision of Nursing Service an additional six (6) months because there were multiple findings and recommendations which would require substantial time to determine and finalize appropriate actions.

j. The testimony of Dr. David Walters and Dr. Carlos Floresguerra revealed convictions that both these physician surgeons would refuse to bring cases to the James H. Quillen VA Medical Center operating room if Nancy Roberts were to return. Dr. Janet Brown states, "I do not want her back in my room."

5. CONCLUSIONS:

a. Conclusion 1: **It is difficult to give patients proper care when employees believe they are working in a hostile environment.**

Analysis: Several of the employees interviewed voiced concerns that they were working in a hostile working environment during the time periods in question and that this environment did have some affect on the quality of care, while not a direct detrimental affect, rendered to the patients. To validate this belief, several others have voiced relief and the belief that the present working environment is decisively improved without Ms. Roberts's presence in the operating room.

b. Conclusion 2: **Under the circumstances, the Chief of Surgery and/or Chief of Anesthesiology's failure to recommend sweeping changes in the interpersonal and professional demeanor of the**

Anesthesiology staff both reflected extremely poor professional judgment, but was not a reckless disregard for whether the actions of the members of the Anesthesiology Section had placed patient safety in jeopardy.

Analysis: It was apparent to the AIB team that the supervisory role of the Chief, Anesthesia is soft. The fact that he has received no supervisory training, receives no support from the AA/Surgical Service or AA/Chief of Staff, and was not informed that his employee was being immediately reassigned suggests that his role as Chief is not taken as seriously as it could be by the facility. This likely contributes to the lack of respect toward authority by Ms. Roberts and other CRNAs.

c. Conclusion 3: **Ms. Roberts's behavior and relationship with the majority of her coworkers did contribute to a very stressful working environment within the OR PACU areas.**

Analysis: In numerous interviews, it was stated that Ms. Roberts was very intimidating to her coworkers. Dr. Floresguerra stated, "staff were intimidated by her presence in saying anything, ordering anything, or acting normally because of problems that have happened." He indicated that staff were "doing things but watching everything else." Dr. Walters stated that Ms. Roberts "was at war with all of her coworkers constantly, would use the union, and in particular, sometimes the EEO process, as a club to beat her fellow employees into submission to whatever she particularly needed done for her own personal gratification." She would, "scribble furiously on a

notebook every word I said, which was characteristic of her, and I became a target." Ms. Ibrahim indicated that Ms. Robert's intimidating behavior affected patient care "because anytime that you are upset, you are not able to focus as clearly on doing what you're you're having to look over your shoulder and she what someone is doing and second guess their next move." Ms. Bruce indicated that Ms. Roberts would raise her voice and she would call Ms. Bruce stupid, incompetent, or lazy. She said it was hard to keep her mind on taking care of patient when she was being verbally abused, especially when it happened in front of patients and in front of coworkers. Ms. Weston stated that she felt that Ms. Roberts would "stop at nothing" to get her way.

These are only a few examples that we heard of Ms. Roberts' intimidating and manipulative behavior. The AIB team unanimously thought that this behavior, though disputed by Ms. Roberts, did contribute to a very uncomfortable work environment that likely made an impact to the care of the patients. There were many examples given during interviews where Ms. Roberts would threaten with EEO actions, union grievances, her husband coming to talk to the Director, etc. These actions also seemingly contributed to the resignation of the former Chief, Surgical Service and OWCP claim (stress) and early disability for two coworkers.

d. Conclusion 4: **Ms. Roberts appeared to have had significant hostility and/or disrespect for anyone that had an authority role within the surgery area.**

Analysis: Based upon interviews, Ms. Roberts seems to take pride in challenging authority and when she can make an authority figure "break." This is very detrimental to a service. It was curious to the AIB team that she seemed to relate well with the ER staff, however, we concluded that her advance training made her somewhat of an "authority figure" among her coworkers who may not have the same extent of training. It is doubtful that there is anyone in the ER area who challenges her intentions and professionalism as done by her peers in the OR area.

Dr. Walters reported that when he stepped down as Chief, Surgical Service, Ms. Roberts "became fairly congenial and less hostile toward me when I lost my badge of authority. I was basically seen and treated as "the enemy" on a daily basis when dealing with her." Dr. Walters indicated that the problems she continuously raised with him were a direct result in him stepping down as service chief. Others reported that she was very pleased she has this affect on Dr. Walters.

Lori Hagen and Wanda Ibrahim were also "primary targets of Ms. Roberts' wrath, on a constant basis" with a steady stream of accusations and complaints." Ms. Hagen reported that she felt physically threatened by Ms. Roberts and many others indicated their "fear" of her. Ms. Roberts would reportedly question their authority on a constant basis and would also regularly take initiatives for tasks that are generally in the scope of a supervisor.

e. Conclusion 5: **The Chief, Anesthesia needs supervisory training and an administrative**

person that he can easily ask for assistance and guidance.

Analysis: If Ms. Roberts does return to the surgery area, it is critical that the person in the Chief role be very involved with hislher staff, in the OR suites observing, and have clear knowledge of supervisory functions. The role of the lead CRNA also needs to be clear and outlined. Though this has been done, other CRNAs continue to make out schedules, etc. The lead should be recognized for the extra duties that he/she has taken above and beyond routine CRNA duties.

f. Conclusion 6: **It has been suggested that Ms. Roberts was not motivated to take on additional cases, often did not adequately prepare for cases, would slow cases so that she would not have to work late, etc.**

Analysis: Though these are performance issues, they are not issues that can easily substantiate removing Ms. Roberts from patient care and revoking her CRNA privileges. Additionally, there was no evidence that Ms. Roberts was ever counseled or reprimanded for these actions.

There were few statements made that would indicate that Ms. Robert's clinical performance was in question. The only comment that was made was by Dr. Janet Brown who said that she had "problems with patients not being adequately sedated for procedures, particularly when Nancy Roberts was administering the sedation." Dr. Brown then went on to make the disturbing statement that she noted several complications of surgery that were caused by patient

movement and inadequate sedation. When asked if she had reported these complications to anyone, she reported that she had not.

g. Conclusion 7: **To put Ms. Roberts back into the Surgical area would only recreate the very dysfunctional environment, possibly at an elevated state.**

Analysis: The AIB team agrees that this could certainly impact patient care. If Ms. Roberts is put back into this environment, there should be an investment in team building for this group, though it is doubtful it would make a significant difference. The AIB team feels strongly that Ms. Roberts should not return to the surgical area, however, there is nothing concrete and substantial to base this significant administrative disciplinary action upon. However, for her to return would likely cause the downfall of Mountain Home's surgical program. The staff within the surgery area appeared to function as a dysfunctional family that is clearly divided into two sections, one that is supportive of Ms. Roberts (this is definitely the minority group) and one that does not want her to return. Many stated that Ms. Roberts was not a team player and spent most of her time monitoring what everyone was doing versus focusing on patient care. Additionally, Ms. Weston indicated that Ms. Roberts was "very intrusive". She indicated that Ms. Roberts would interrupt while she was interviewing a patient and "take over."

Many indicated that Ms. Roberts would keep detailed records of their breaks, lunches, call schedules, etc.

and comment if they were away any longer than Ms. Roberts thought was necessary.

The AIB team agreed that Ms. Roberts was likely not the only influence in the personality conflicts within the surgical suite. The AIB team thought that there were likely many others who "kept things stirred up" with Ms. Roberts through their communication with her, name calling, keeping records on Ms. Roberts (as she was doing to them), etc.

When Ms. Roberts was reassigned, the atmosphere reportedly settled and everyone began working as a team, including to a degree Ms. Harris, Ms. Roberts' only friend and supporter that we interviewed. It is interesting to also note that Ms. Roberts is apparently working well in the ER environment, thus supporting that the conflicts had likely become a two-way flow.

5. RECOMMENDATIONS: The AIB team recommends that the James H. Quillen VA Medical Center Quality Management Office do a thorough review of case outcomes, by CRNA and surgeon, specifically for ophthalmology. If the review indicates that Ms. Roberts did have a higher complication rate, there could be clinical performance issues that need to be addressed. If one surgeon has a higher complication rate, that would need to be addressed as well.

The AIB team could find no history of formal disciplinary action, counseling, etc. Additionally, Ms. Roberts was removed from patient care without her supervisor's advance knowledge and without Ms. Roberts being able to review the formal complaints made against her. (The AIB team thought it would

have been prudent to share the petitions with the names involved, with Ms. Roberts as evidence supporting the detail.)

The AIB team unanimously agree that the reappointment to Ms. Roberts to the Anesthesia Service would be detrimental to the James H. Quillen VA Medical Center surgery program as many surgeons will reportedly resign and patient care could be compromised through the many distractions this would cause. We can find no regulations or actions that could support the revocation of Ms. Roberts' privileges as a CRNA. For Ms. Roberts to remain as a registered nurse in another service at CRNA pay is expensive but possibly worth the price for the facility. Ms. Roberts indicated she wants to transfer to another VA facility, which should be facilitated, and would also be the best for all involved parties. If a Human Resources Management Service (HRMS) specialist can find a way to legally support keeping Ms. Roberts from the surgery area, the AIB team would firmly support this action.

/s/_____ Date _____
Henry C. Talley V, Chairperson

/s/_____ Date _____
Linda Salansky, Member

/s/_____ Date _____
Marianne Chick, Member

Concur with these recommendations
/s/ Carl J. Gerber 6/19/02

INVESTIGATION OF OPERATING ROOM AND ANESTHESIA SERVICES

JAMES H. QUILLEN VA MEDICAL CENTER, MOUNTAIN HOME TN

EXHIBITS INDEX

Number	Description	Source
1	Administrative Investigation Board Appointment Memorandum dated Mach 2, 2002	AIB Charge Letter
2	Email Re: AIB tentative schedule, dated March 6, 2002, by Henry C. Tally	AIB Information provided by Chairperson
3	Letter/Petition dated 6/13/01, signed by Surgical Service CRNA Staff members	AIB Charge
4	Letter/Petition dated June 14, 2001, signed by Surgical Service Physicians	AIB Charge

Number	Description	Source
5	Letter/Petition, no date, signed by Surgical Service staff members	AIB Charge
6	Memorandum dated March 1, 1999 Re: Administrative Assignments for CRNA Staff by Chief, Anesthesia Section	AIB Information requested by the Board and provided by Chief, Anesthesia Section
7	Overtime Hours Worked by CRNAs Mar 1 - Nov 6,1999	AIB Information requested by Board and provided by Chief, Surgical Service
8	Applications for Lead CRNA dated December 3 - December 10, 1999, by CRNA Staff	AIB Information provided by Chief Anesthesia Section

Number	Description	Source
9	Memorandum Re: Assignment, Lead Responsibilities, dated December 27, 1999, by Chief Anesthesia Section and Chief, Surgical Service	AIB Information provided by Chief, Anesthesia Section
10	Anesthesia Section Meeting, dated December 27,1999	AIB Information provided by Chief, Surgical Service
11	Memorandum Re: Nancy Roberts, CRNA, dated January 3, 2001, by Surgical Staff	AIB Information provided to Board
12	Request for Clinical Privileges, VAMC, Mountain Home, TN, dated February 23, 2001, by Chief Anesthesia Section	AIB Information provided by Chief, Surgical Service
13	Memo, Subject: Detail, dated June 28, 2001, by Dr. Cancellaro, Chief of Staff	AIB Information provided by Human Resources

Number	Description	Source
14	Letter Re: Medical Condition of Julie Bruce, dated July 9, 2001, by Charles A. Bolick, M.D. and dated December 19, 2001 by Richard G. Salamone, Ph.D.	AIB information provided by Julie Bruce
15	Final Report - Administrative Fact-Finding Board, dated July 18, 2001, by Daniel Kyte, Chairperson	AIB Report provided by Human Resources
16	Proficiency Reports, 12/98-12/99, 12/99-12/00, 12/00-12/01, for Nancy Robert, CRNA	AIB Information provided by Human Resources
17	Primary Role of nurse anesthetist, no date, no signature	AIB information provided by Chief, Surgical Service
18	Items Discussed with Ms. Ibrahim, no date, by Dr. Goulding	AIB information provided by Chief, Anesthesia Section

Number	Description	Source
19	Time line, Mar 99 - Aug 2001, no date, by Julie Bruce	AIB information provided by Julie Bruce
20	Notes, no date, by Lori Hagen	AIB information provided by Lori Hagen, R.N.
21	Notes, no date, no signature by Wanda Ibrahim	AIB Information provided by Wanda Ibrahim
22	Note Re: Julie Bruce's Medical Status, dated December 24, 2001, by Charles A. Bolick, M.D.	AIB Information provided by Julie Bruce
23	Report of Contact Re: Wanda L. Mardis Disability Retirement datêd 1/7/2002, by Sue Warren	AIB Information provided by Human Resources Management
24	Letter dated 02-03-2002 to Dr. Cancellaro, Chief of Staff, by (Margaret) Rachel Weston	AIB Information provided to the Board

Number	Description	Source
25	Transcript of Testimony given March 11, 2002 by Lori Hagen, R.N.	AIB Interview
26	Transcript of Testimony given March 12, 2002 by Theron T. Knight, M.D.	AIB Interview
27	Transcript of Testimony given March 12, 2002 by Julie Dunn, M.D.	AIB Interview
28	Transcript of Testimony given March 12, 2002 by Clarence Goulding, M.D.	AIB Interview
29	Transcript of Testimony given March 12, 2002 by Julie Bruce, R.N.	AIB Interview
30	Transcript of Testimony given March 12, 2002 by Janelle Ogle, L.P.N.	AIB Interview

Number	Description	Source
31	Transcript of Testimony given March 12, 2002 by Wanda Ibrahim, Lead CRNA	AIB Interview
32	Transcript of Testimony given March 12, 2002 by Ruben Fuentes, CRNA	AIB Interview
33	Transcript of Testimony given March 12, 2002 by Barbara Kimbrough, M.D.	AIB Interview
34	Transcript of Testimony given March 13, 2002 by Carlos Floresguerra, M.D.	AIB Interview
35	Transcript of Testimony given March 13, 2002 by David Walters, M.D.	AIB Interview

Number	Description	Source
36	Transcript of Testimony given March 13, 2002 by Louis A. Cancellaro, Ph.D., M.D.	AIB Interview
37	Transcript of Testimony given March 13, 2002 by Patsy Fish	AIB Interview
38	Transcript of Testimony given March 13, 2002 by Carol DuBay, R.N.	AIB Interview
39	Transcript of Testimony given March 13, 2002 by James Wayne Battle, M.D.	AIB Interview
40	Transcript of Testimony given March 13, 2002 by Linda Garland, R.N.	AIB interview
41	Transcript of Testimony given March 13, 2002 by Janet Brown, M.D.	AIB Interview

Number	Description	Source
42	Transcript of Testimony given March 13, 2002 by Mabel Irwin, R.N.	AIB Interview
43	Transcript of Testimony given March 13, 2002 by Carol Lutz, R.N.	AIB Interview
44	Transcript of Testimony given March 13, 2002 by Patricia Richards, R.N.	AIB Interview
45	Transcript of Testimony given March 13, 2002 by Cathy Hunt, CRNA	AIB Interview
46	Transcript of Testimony given March 13, 2002 by Nancy Roberts, CRNA	AIB Interview
47	Transcript of Testimony given March 14, 2002 by Rachel Weston, CRNA	AIB Interview

Number	Description	Source
48	Transcript of Testimony given March 14, 2002 by Ronald McQueen	AIB Interview
49	Transcript of Testimony given March 14, 2002 by Loyd Kyte, R.N.	AIB Interview
50	Transcript of Testimony given March 14, 2002 by Carolyn Harris, CRNA	AIB Interview
51	Transcript of Testimony given March 13, 2002 by David Stevens, CRNA	AIB Interview
52	Witness Declaration by Diana R. Odle, R.N., no date	AIB Witness Declaration
53	Witness Declaration given March 11, 2002 by Norma Swanson	AIB Witness Declaration

APPENDIX J

PLAINTIFF'S EXHIBIT

CASE
NO. 2:02-cv-166

EXHIBIT
NO. 26

Department of Veterans Affairs **MEMORANDUM**

Date July 16, 2002

From Chief of Staff (11)

Subject Reassignment

To Nancy Roberts (112)

1. In June, 2001, the Medical Center Director received petitions signed by numerous employees from Surgical Service expressing their feelings of working in a hostile and stressful environment. This was due to your displays of intimidating and inappropriate behavior. Based on these petitions, a fact-finding board was convened to examine the facts surrounding allegations of improper behavior by you. You were detailed effective June 27, 2002, to a staff nurse

position in the emergency room during the fact-finding.

2. In their final report, the board made several recommendations to address internal management issues. They also felt the allegations made by your co-workers were sustained. To specifically address these allegations, an administrative board of investigation comprised of members from three separate VA facilities in VISN 9 were appointed. In the summary report of this board, a recommendation was made that you be placed in a position other than in Surgical Service.

3. Based on that recommendation, you are being reassigned to a staff nurse anesthetist(CRNA) position in Medical Service effective August 1, 2002. Attached is the scope of practice for this position. You will remain, in your current detail until that reporting date.

4. If you have any questions, you may contact Patsy Fish, Human Resources: extension 1788.

/s/
LOUIS A. CANCELLARO, Ph.D., M.D.
Chief of Staff

Attachment

SCOPE OF PRACTICE STATEMENT
FOR
STAFF NURSE ANESTHETIST (CRNA)

NAME: Nancy H. Roberts

DEGREE: RN

CERTIFICATION: CRNA

PRIMARY FUNCTION: RN/NURSE ANESTHETIST

PERIOD: 7/16/02 - 7/16/04

1. ASSIGNMENT: Medical Service

2. SUPERVISION: Chief, Gastroenterology Section

3. PROFICIENCY EVALUATION: Will be completed annually by the Chief, Gastroenterology Section in concurrence with the Chief, Medical Service.

   Nurse Anesthesia activities in the GI lab are restrictive to IV conscious sedation under the supervision of the attending physician.

4. ROUTINE DUTIES:

   I. Interpersonal Relationships

      A. Works effectively with patents, family members, and/or significant others.

B. Works effectively with professional/ supportive personnel who provide patient care and with members of other services.

II. Nursing Practice

A. Clinical Assessment - Completes/review pre-procedure assessment upon patient's arrival in GI Lab and performs ongoing assessment throughout procedure.
B. Planning - Plan appropriate nursing care based upon assessments.
C. Implementation - Implements appropriate nursing actions. Integrates universal precautions/infection control guidelines into the delivery of care. Maintains skills as assessed in annual competency assessments.
D. Evaluates and revises care based upon ongoing assessments and patient's response to interventions.
E. Documentation - Accurately documents and reports care.
F. Administers IV conscious sedation under the direction of the attending gastroenterologist.

III. Research

A. Participates in research activities as requested
B. Incorporates the latest nursing knowledge, research findings, etc. into nursing practice

IV. Education

A. Patient Education - Identifies learning needs and assesses, plans, provides and/or evaluates patient/family significant other teaching.
B. Self-Development - Assumes responsibility for professional development.

V. Emergency Duties - Must be able to respond to situations of a life-threatening nature on a daily basis. Must act promptly, recognizing the need for supervisory assistance and support, and summonsing same forthwith.

APPENDIX K

EXCERPTS OF DR. JAMES BATTLE'S TRIAL TESTIMONY, JANUARY 18, 2006

* * *

[p.245]

MR. DEVAULT: would the Clerk show Dr. Battle Exhibit Number 23, his administrative investigative affidavit.

DIRECT EXAMINATION

BY MR. DEVAULT:

Q. Dr. Battle, would you state your full name and address, please, for The Court.

A. James Wayne Battle, Jr., 1209 Granite Drive, Johnson City.

Q. And how old a gentleman are you, sir?

A. Sixty-six.

Q. And you're retired?

A. Yes.

Q. When did you retire, sir?

A. In May 2004.

Q. And what was your profession?

A. I was a surgeon.

Q. And where did you practice your surgery, sir?

A. Both at the Johnson City Medical Center and the VA.

Q. How long were you at the VA?

A. Ten years.

Q. Now, during that ten years time -- I take it then it was '94 to 2004 at the VA?

A. Right, correct.

Q. During that ten year period of time from '94 to at

[p.246]

Least 2001, while Ms. Roberts was there I believe from '96 to 2001, did you have occasion that Ms. Nancy Roberts worked as the CRNA in surgeries that you performed?

A. Yes.

Q. Did you have any professional problems with her?

A. No.

Q. Did you have any personal problems with her?

A. No.

MR. DEVAULT: would you show the witness Exhibit Number 1, please.

Q. Dr. Battle, there did come a time in, on or about June 14, 2001, when you signed a petition that complained about her filing the complaint against Lori Hagen, did you not?

A. Yes.

Q. And you're looking at Exhibit Number 1, and that's your signature, one, two, three, third down?

A. Yes.

Q. Do you remember who asked you to sign the petition?

A. I believe it was Dr. Dunn.

Q. Now, did -- you also testified before the administrative investigative board that was held the next year; did you not?

A. Yes.

Q. And at the time you were aware -- or what was your

[p.247]

understanding of your testimony as a VA surgeon, did you have to appear and testify truthfully?

A. Yes, I -- it was my understanding.

Q. It was not optional for you; was it?

A. Not that I'm aware of.

Q. And if you'll look at your exhibit, Exhibit 23, at the end of the, your testimony you signed a statement of employee rights and obligations, did you not, on March 13, 2002?

A. Yes.

Q. You've had a chance to review your testimony to the AIB; have you not?

A. Yes.

Q. Is what's written in this Exhibit Number 23 accurate, does it accurately reflect what you told the board?

A. Yes.

Q. Why did you, why did you sign the petition complaining about Ms. Roberts?

A. I signed it for the operating room and the way it was run by Ms. Hagen. I thought it was very well run, and it was in the best interest to keep it that way.

Q. According to your testimony here, you talk about a complaint that Ms. Roberts filed against Ms. Hagen; is that right?

A. Yes.

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Q. What was your understanding of that complaint?

A. I wasn't sure exactly what it was, but it was my understanding that that's the reason she resigned at that time.

Q. You understood that the reason that Ms. Hagen resigned from her O.R. nurse manager position was because Ms. Roberts had filed a complaint against her?

A. Yes.

Q. And you liked the way Ms. Hagen was running the O.R., did you not?

A. Yes.

Q. You had nothing personal against Ms. Roberts; did you?

A. No.

Q. No criticism of her professional skills?

A. Not at all.

Q. She had never been impolite or rude to you; had she?

A. Not at all.

Q. Had you ever seen her be impolite or rude to anyone?

A. No.

Q. Was the operating room -- I guess a word could be used -- in turmoil or was it, was it a abuzz with the talk about Ms. Roberts' charge against Ms. Hagen?

A. Yes, it was.

Q. Were the people that you talked to there, was the

* * *

[p.253]

Q. Dr. Battle, at that time did you do colonoscopies mostly, 2001?

A. I did colonoscopies, among operative surgery.

Q. And did colonoscopies at that time utilize nurse anesthetists?

A. Occasionally.

Q. But not all the time?

A. Not all the time.

Q. So you really didn't interact with Mrs. Roberts that much?

A. Yes, during major cases in the operating room.

Q. About how often?

A. Oh, I guess a quarter of the time.

MS. SMITH: A quarter of the time. Thank you.

THE COURT: All right. My question had to do with Exhibit 23, do you have any objection to it now?

MR. SMITH: Nor him. No, he's laid the foundation.

THE COURT: All right. Exhibit 23 is admitted.

EXAMINATION

BY THE COURT:

Q. Dr. Battle, before you go down, let me ask you a couple of questions. Would you have signed this petition if you had known that this complaint had nothing to do with Ms. Hagen's decision to take another job?

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A. Probably not.

Q. Is that the only reason that you signed it?

A. Yes.

Q. Because you thought that Ms. Roberts had made some sort of complaint that had caused Ms. Hagen to leave the O.R.?

A. Right.

Q. You told Mr. DeVault that you never saw Ms. Roberts be impolite or rude. Did you have any sense or any impression that there was conflict between Ms. Roberts and any other staff member in the O.R.?

A. Not any other -- well, at one time with the chief of surgery, but that was an entirely different thing years before.

Q. And I'm aware of that. Did you have a sense or were you generally aware that there was a conflict between Ms. Roberts and Lori Hagen prior to the time you heard about this complaint?

A. I had heard vague rumors, but nothing I could --

Q. But it was nothing you had ever witnessed?

A. Right.

THE COURT: All right. Thank you very much. You may be excused.

Who is your next witness, Mr. DeVault?

MR. DEVAULT: Your honor, we would -- to

* * *

APPENDIX L

PLAINTIFF'S EXHIBIT

CASE
NO. 2:02-cv-166

EXHIBIT
NO 23

ADMINISTRATIVE INVESTIGATION

Affidavit of: **James Wayne Battle, M.D.**

TALLEY: This is Wednesday, March 13, 2002, the time 11:23 a.m. Speaking is Henry C. Talley, Chair of the Administrative Investigation, convened for the purpose of hearing testimony of Dr. James Wayne Battle, concerning issues surrounding the improper behavior of a CRNA, that may have caused a hostile working environment and may have impacted the quality of patient care here at the VA .. We are meeting in Room D227. Present are Dr. Battle, myself, Henry Talley, Linda Salansky, and Marianne Chick. We are the only four people in the room. This interview is being taped. We have permission from Dr. Battle to tape record his testimony, and we have a statement of his understanding of his obligations and rights during the testimony. I'd first like to start by administering an oath to you, so if you would just

please state your full name and your current position and employer.

BATTLE: James Wayne Battle, Jr., general surgeon.

TALLEY: And your employer.

BATTLE: VA Hospital, ETSU Med School.

TALLEY: Okay. Do you solemnly swear that the testimony you will give ii the case under investigation will be the truth, the whole truth, and nothing but the truth, so help you God.

BATTLE: I do.

TALLEY: Okay. Thank you. And what. .. as I stated earlier, the issues that we're really concerned with are the improper behavior of a CRNA, particularly the CRNA that has seemed to come up time and time again, is Nancy Roberts, whether or not a hostile working environment was created because of the behavior, and whether or not there is an impact on the quality of care being rendered to the patients. What we would like for you to do, in your own words, is relate any information or any circumstances that you particularly personally had ... may have encountered, revolving around these three issues, and how you view what's going on as ... from the past to the present. We will probably, or may, more than likely interrupt for clarification or will ask for names and things or that sort while you're talking.

BATTLE: I think ... most of the people in the Operating Room were shocked when they heard what ... the trip to Washington and the results of it.

TALLEY: The trip to Washington?

BATTLE: By Ms. Roberts.

TALLEY: She went to Washington?

BATTLE: Yes.

TALLEY: Have ... can you explain?

BATTLE: I don't know that she went to the ...

CHICK: Excuse me ... EEO.

BATTLE: And I thought we had a well-run Operating Room by Ms. Hague She was fair and just.

TALLEY: Ms. Hagen?

BATTLE: Hagen. And ... uh ... shocked that this happened and I questioned who would be next. And that's ... I personally have no ... uh ... adverse contact with Ms. Roberts. But there was considerable disruption when this happened.

CHICK: Can you expand on that a little bit ... the disruption?

BATTLE: People just couldn't believe it, you know, and the charges ... I understand that Ms. Hagen was ... required everybody to call her major ... she is a

major in the Reserve, and I don't ... a lot of people jokingly called her that, but she never to my knowledge required anybody to do that.

CHICK: As a surgeon, when you would work with Ms. Roberts as your CRNA in the room, her clinical competency ... was there every any ... ?

BATTLE: Average. I have no problems with her competency.

CHICK: You didn't have any problems ... okay. Did you ever see her be disrespectful to you or your peers or any of your coworkers?

BATTLE: No to me personally.

CHICK: Did you see her be disrespectful to anyone else?

BATTLE: Not that I'm ...

TALLEY: Have you been working at the VA very long?

BATTLE: I've been here eight years.

TALLEY: Eight years. So you ... you were here when Ms. Roberts came?

BATTLE: Before she came.

TALLEY: Before she came. Have you seen in any change in the environment in the way that the Operating Room functioned from before she came,

during her stay, and since her detailing to a different area of the hospital?

BATTLE: I can say that Ms. Hagen really improved matters in the Operating Room. It was very efficiently run, and ... uh ... her fairness with all the employees, I think, was exemplary. And ... uh ... this sort of came as a stroke out of the blue and nobody really understands it ... truly understands the ... all the charges that were leveled. I certainly don't, and ... uh ...

CHICK: Do you know there was ... and I'm trying to find it in my notes, and I don't think I ... it seems as though someone mentioned that you were involved in a case that you were the attending of record, and _____ the situation, but there was some delay in getting the patient into the OR due to Ms. Roberts ... and I think they said it was Dr. Battle ... do you recall anything like that?

BATTLE: No, I can't say that I do.

CHICK: Okay.

BATTLE: I mean I ... it could have happened, but I honestly don't.

CHICK: Okay.

TALLEY: Are you concerned at all that ... uh ... that the care ... that patient care could possibly be in jeopardy with all the things that have been going on or that go on in the Operating Room?

BATTLE: Now?

TALLEY: Yes, sir.

BATTLE: No, I ...

TALLEY: What about before when Ms. Roberts was in the Operating Room?

BATTLE: No, I'm not concerned.

TALLEY: You have no concern that patient ... Okay.

BATTLE: My problem was just shock that this happened, really. I didn't understand it nor know why, and was fearful that who would be next, you know, wondered ...

TALLEY: If ... I guess I'm also trying to explain, like ... or understand, who ... who will be next, meaning?

BATTLE: Who would get ... have action brought against them that I would consider unjustified.

TALLEY: The action brought against whom?

BATTLE: Mrs. Hagen.

TALLEY: Ms. Hagen was ... you think was unjustified?

BATTLE: I don't understand all of it. I don't think any of us were privy to exactly what went on, but ... she was certainly running a good ship or whatever you want to call it, and this just came 'out of the blue.

TALLEY: Uh ... just in that same light, and this is just your personal feeling ... uh ... Ms. Roberts was detailed to a different area of the hospital. Do you think that that was justified?

BATTLE: Yes.

TALLEY: You do. Why do you think that would be? And Ms. Hagen not ... just curious.

BATTLE: Well, she was ... Ms. Hagen resigned as a result of this.

TALLEY: Um-hum.

BATTLE: I think people were, if you want the truth, scared of her.

TALLEY: Scared of Ms. Hagen?

BATTLE: No! Ms. Roberts. You know, what would be the next to have action brought against them. Not understanding the charges there ... uh ... and I certainly was unaware that Ms. Hagen was in any was mistreating her or anybody else, and wonder what ...

TALLEY: Are you aware that Ms. Roberts might soon be returning to the Operating Room?

BATTLE: I am retiring on April 30th. That's my response. I mean, that's planned. That's not result or ....

TALLEY: Um-hum. Um-hum.

CHICK: I don't have anything further. Is there anything that you would like to add that we have not asked you?

BATTLE: Not really.

TALLEY: Okay, Dr. Battle. In a few days you will be given a verbatim transcript of your testimony for you to review for accuracy and for your signature. We ask that you avoid discussing your testimony with anyone. If there's any sign of retaliation for you having spoken with the Board today, please notify one of us immediately. The Board would like to thank you for your testimony and advise you that you may be recalled if there are any further questions. If, in the event that you are recalled, I would like to remind you that you would still be under oath.

BATTLE: Okay.

TALLEY: Thank you very much, sir.

CHICK: Thank you.

I have read each page of this statement consisting of **6** pages and I certify that the information given is true to the best of my knowledge.

/s/ _____ 3/22/2002

NAME Date

/s/ _____ 3/22/02

(Witness) Signature Date Date

STATEMENT OF EMPLOYEE RIGHTS AND OBLIGATIONS

1. As a DVA employee, you are required to furnish all information or evidence in your possession and to testify freely and honestly concerning your knowledge of the matter under investigation. Any refusal on your part to testify, or any concealment of a material fact, or any inaccurate testimony knowingly and willingly given, may be grounds for disciplinary action against you personally.

2. You are not required, however, so give testimony against yourself in any matter in which there is an indication you were involved personally in a violation of the law and there is a possibility your testimony would be self-incriminating.

3. Your right ro refuse to answer a question on the grounds that your response might tend to incriminate you is a personal right. You do not have the right to refuse to answer a question on the grounds that your response might incriminate a person other than yourself.

4. You have the right to representation. If at any time during questioning you feel that your rights as an employee are being violated, you may request that questioning be suspended to afford you an opportunity to seek advice from your personal representative in accordance with rules and regulations of the Department of Veterans Affairs.

5. A copy of your own personal testimony will be provided to you upon your written request. You will be

given an opportunity to read and sign your testimony or affidavit if and when it is transcribed and to make additions or corrections thereto before signing.

I HAVE READ OR HAVE HAD READ TO ME THE RIGHTS AND OBLIGATIONS OF A DVA EMPLOYEE AS OUTLINED ABOVE AND FULLY UNDERSTAND THEM.

James W. Battle	
NAME OF EMPLOYEE	DATE
/s/	3/13/200\
NAME OF EMPLOYEE	DATE
/s/	13 MAR 02
SIGNATURE OF WITNESS	DATE

JWB
Initials

Department of Veterans Affairs	
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APPENDIX M

EXCERPT OF NANCY ROBERT'S TRIAL TESTIMONY, JANUARY 18, 2006

* * *

[p.68]

If it please the court, if we could take up a matter about the exhibits. The court clerk and court reporter have taken the originals. We are withdrawing number 38, Ms. Wanda Ibrahim's AIB testimony.

THE COURT: All right. 38 is withdrawn.

MR. DEVAULT: I have previously filed designation of depositions pursuant to your Honor's discussion at our status conference for Dr. Cancellaro and Dr. Gerber, and I'm advised that I need to make those actual exhibits, and so we're substituting, exhibit number 35 will be Dr. Cancellaro's deposition with exhibits and number 36 will be Dr. Gerber's deposition with exhibits.

THE COURT: So 35 and 36 that you have on your list are replaced with these two?

MR. DEVAULT: Yes, Your Honor.

THE COURT: All right.

Nancy Roberts, Plaintiff's Witness, Sworn
DIRECT EXAMINATION

BY MR. DEVAULT:

Q. Ms. Roberts, would you state your full name and address for the court, please.

A. Nancy Roberts, 303 Bonita Drive, Johnson City.

Q. And how old a lady are you, Ms. Roberts?

A. I'm 57.

Q. How long have you worked at VA facilities, including

[p.69]

The Mountain Home facility?

A. Twenty-one years.

Q. And you are a certified registered nurse anesthetist?

A. In name only.

Q. Now, in name only; is that correct?

A. Yes, sir.

Q. Would you tell the Court what your primary duties consisted of when you were practicing your nurse anesthetist duties at the VA?

A. I had all the rights and privileges therein, which included working up patients before surgery, monitoring them, ordering blood products, chest x-rays, EKG's, any other special tests, like CT scans of the head and neck, stress tests, consults with other physicians, if I felt it was necessary; also anesthetizing the patients in an appropriate manner, which included blocks, spinals, epidurals, regionals, general anesthesia; and taking care of them immediately post operative, and even if the need arose doing epidurals in the unit, intubating, extubating.

Q. And you did that on a regular basis at the Mountain Home Medical Center until you were removed from your position on June 27, 2001; Is that correct?

A. Yes, sir.

Q. And you are presently employed in what section of the hospital?

[p.70]

A. Bronchoscopy lab.

Q. And what do you do there?

A. I give what's called IV sedation.

Q. Approximately how many of your former nurse anesthetist practices are you not able to practice in the bronchoscopy lab?

A. Eighty-five percent.

Q. Is there any other condition that attaches with regard to availability of call, on-call pay or overtime?

A. No, sir.

Q. And what, what was that situation when you were a nurse anesthetist?

A. I was heavily invested in the call schedule in the department.

Q. Did you --

THE COURT: Ms. Roberts, would you speak up just a little bit, please.

THE WITNESS: I'm sorry.

I was heavily invested in the call schedule in the department.

Q. And tell the Court what the on-call or availability situation is and what the overtime situation was when you were working in the anesthesia unit?

A. We had approximately three types or four types of ways that you could earn overtime, and one of those four

[p.71]

ways was comp time, which meant if you worked four hours over after your regular shift, you could take compensatory time or overtime. The other thing was

just regular overtime, which meant you had to carry a beeper, they call that on standby, and you were paid approximately 10 percent of your hourly salary to carry a beeper. The hospital owned you. You had to be within a certain distance availability to the hospital when you were on standby; and then if you actually worked, you made call pay. We also had stay late, which was is if cases ran over in the afternoon and you were not the call person, you earned overtime by being a stay late person. There's no rotation with that. We had no second call; and then sometimes I remember one particular incident I was at home on a beautiful Saturday and Maxine Darling, a nurse anesthetist, called me and said, Nancy, they've got a ruptured aorta aneurysm; and I'm five minutes away. I said, I'm on my way, you need say no more. I was on six or seven hours overtime. That happened to me frequently because I live close to the hospital.

Q. You are married?

A. Yes, sir.

Q. Is your husband retired?

A. Yes, sir.

Q. And you have two adult daughters?

* * *

[p.77]

Of those; so it wasn't so much the cases, it was the hours that a case was involved around.

Q. Did the VA employ while you were there and bring in a CRNA named Ruben Fuentes?

A. Yes, sir.

Q. And how long had you been there when he came in?

A. He came there in '99. I had been there about three years.

Q. Now, moving closer to the January of '01, December of 2000, January '01, did you, did you become concerned or did you react in any way to anything that Mr. Fuentes was doing in the nurse anesthetist office or in your proximity?

A. May I elaborate on that?

Q. Yes, please.

A. There were a number of incidents. They started with porno cartoons. One cartoon had a man with a very erected penis and no clothes on. One cartoon had a very obese lady with a two piece bikini on with a flip flop in the posterior crevice, I guess, is only way I know how to say this properly; and she was saying, where is my flip flop? Where is my flip flop?

Q. Now, where did you see these?

A. These were in the anesthesia work room posted, and --

Q. You mean posted on the board or on the wall?

A. We had a, sort of like a ledge like this behind the

[p.78]

Sink, and they were propped against there.

Q. And how did you know who, who had done that?

A. He admitted it. He laughed. He said, aren't these cartoons funny?

Q. And you're talking about Mr. Fuentes?

A. Yes, sir.

Q. Did he have particular names that he called you or other female CRNA's?

A. Bitches, morons, stupid.

Q. Did you tell Mr. Fuentes that you objected to it and you wished he'd stop?

A. I did.

Q. Did it offend you?

A. Yes, it did.

Q. Did you complain to Dr. Clarence Goulding?

A. I did.

Q. Now, who was Dr. Clarence Goulding?

A. The Chief of the Anesthesia Department, my first line supervisor.

Q. Did Dr. Goulding do anything that you could observe –

MR. SMITH: Objection, Your Honor, on the grounds of relevance. This is now a retaliation case. The sexual harassment case is gone.

THE COURT: We're not going to try that, move

[p.79]

On.

Q. Okay. Did you complain to Dr. Goulding about Mr. Fuentes?

A. Yes, several times.

Q. And is one of those occasions on or about January the 24th, 2001?

A. (Nods head up and down).

Q. You need to say yes, for the record.

A. Yes.

Q. And Did Dr. Goulding have any particular reaction to you when you complained about it?

A. Yes, sir. We had had a meeting in the office, and Mr. Fuentes had torn up two of my anesthesia records

on patients I had worked up that morning and spent a lot of time on; and there was -- his rationale was that the more records -- excuse me, okay.

Q. Yes.

A. Yes.

Q. Let's get to what Dr. Goulding told you when you complained about Mr. Fuentes.

A. We were in the office. I asked, I asked him, why did you tear up my two sheets? I spent 30, 45 minutes on each of those. He said, you're a liar, you're stupid; and I left. I went to bathroom number one because all my work had gone down the drain; and when I came back, Carolyn

[p.80]

Harris was talking to Dr. Goulding at that time.

Q. Did you complain to Dr. Goulding?

A. I said, Dr. Goulding, please, can you not address that? He said, I heard what he said. I said, well, would you address that? And he said, you can address it any damn well way you want to; and I said --

MR. SMITH: Again, Your Honor, this is way off Course.

THE COURT: The parties have stipulated that ms. Roberts complained to the anesthesia chief Section Dr. Goulding and that Dr. Goulding and the Surgery Chief

Dr. Knight had failed to discipline him and that thereafter she contacted the VA equal employment opportunity counselor but didn't file formal charges. That's all stipulated to. Details of all those allegations have nothing to do with this.

MR. DEVAULT: Right, Your Honor; but what I was trying to get to is the interaction the next day with Lori Hagen and what caused it; and that's where we want to be, Ms. Roberts.

THE WITNESS: All right.

Q. Now, the next day did Lori Hagen say anything to you? And tell the court where she was, what she said and what you said.

A. I came in the next morning, which was January 25th,

[p.81]

And I was sitting at my desk, much like I'm sitting here, looking at my load for the day; And Judy McNeil yelled from across the hall, she said, and she said, Dr. Goulding is not going to be here today; and I said, okay; and about that time Ms. Hagen popped around the corner and said, it's your fault. You did this. You should be ashamed of yourself. I said, that's enough, Lori. You're out of line. She was standing there very mad. She went down the hall, and she came back, and she said, you're the reason he's having chest pains, this is your problem; and I got up and walked out the door to Dr. Knight's office, and she followed me down the hallway to Dr. Knight's office. His office was dark,

and I knew he wasn't there; and she cornered me in the room, she liked to block my egress, and she said to me, he's a kind man. You need to be nicer to him. This is your fault he's having chest pains; and I said, Lori, you're not going to lay his obesity and his hypertension and his diabetes and all his problems on my feet, I am not responsible for his medical problems; and she said, well, we're going to the union on this. I'm taking you to the union, and Dr. Knight will be there at 2:00 this afternoon; and I said, that's fine; but if my supervisor is there, I want Mr. Morales there. Well, we're not going to bother Mr. Morales with this; and then I said, well, I'm not going to meet with you.

[p.82]

Q. Now, did you follow ms. Hagen down the hall and talk to her in a loud voice?

A. No, I never.

Q. How soon after that did you contact an EEO Counselor?

A. It was the 29th of January.

Q. So four days later, approximately, is that right?

A. Yeah. There was probably a weekend in there. I'm not sure, Mr. Devault.

Q. And what names did you give the counselor with regard to the individuals you felt had either discriminated against you or retaliated against you, what names did you give them?

A. Lori Hagen and Ruben Fuentes.

Q. Did you hear any more from the EEO Counselor after you had this initial contact?

A. Yes. You call and you report this, and they call you back later. They assign a counselor, and they call you back later and advise you as to what they would like for you to do; so it was Rachel Burkhart who called me.

MS. SMITH: I object, Your Honor. This is all hearsay.

THE COURT: Well, that much is not hearsay, but what the counselor said to her in that conversation would be. Sustained as to that.

Q. Now, was there a dispute resolution period that ran

[p.83]

while the EEO was attempting to work out some type of settlement of this?

A. Forty-five days.

Q. In other words, you didn't file formal charges on that first phone call?

A. No, sir. I met with Dr. Knight on February the 8th, with Patsy Fish and the Union Rep, and he --

Q. Tell the Court who Patsy Fish is because she's on the defendants' witness list.

A. She was labor relations specialist at that time.

Q. At the VA?

A. Yes, sir.

Q. She was a representative of the VA that you would have contact with; is that correct?

A. Yes.

Q. Did the -- did you meet with these individual supervisors at the VA upon the recommendation of the EEO Counselor?

A. Yes, sir.

Q. And in meeting with them, was, was a resolution reached?

A. Yes. I felt like there had been because Dr. Knight told me he would talk to Mr. Fuentes and that he would report this to Ms. Hagen's supervisors because he was not her supervisor and he cannot address that with her, but he

[p.84]

Would report that.

Q. Now, Dr. --

MR. SMITH: I'm going to object, Your Honor. Dr. Knight, again, it's all hearsay.

MR. DEVAULT: Well, Dr. Knight --

THE COURT: Just a minute. It is hearsay, sustained.

MR. DEVAULT: Well, if it please the Court, Dr. Knight is the Chief of Surgery, we think it's an admission. You know, he's speaking for the VA, and it would not be inadmissible as hearsay.

THE COURT: We're not trying these individual complaints, Mr. Devault.

MR. DEVAULT: It goes to show notice and the reason what happens, what happens later, your honor.

THE COURT: All right. I'll admit it for that limited purpose, but I think it's got a very slight relevance.

Q. Now, did circumstances there in the Anesthesia Unit and with Ms. Hagen calm down, so to speak, for a while?

A. Right, greatly improved.

Q. Did you make a decision as to whether or not to go formal with your earlier charge?

A. I did.

Q. And what decision was that?

[p.85]

A. I thought, we have been able to settle this on the local level where it should remain and things are calmer, and I did not formalize that complaint.

Q. Now, did something happen between you and Ms. Hagen on or about April 19, 2001 in the hallway?

A. Yes.

Q. Tell the court what happened between you and Ms. Hagen on that April date.

A. She accosted me in my office, blocked my egress again. I was in there by myself. She got right up in my face and pointed her finger at me and she said, you are mean and evil and condescending and my staff thinks you're crazy, and she pointed her finger at me, and she was tight lipped; and I said, is that all, and I left.

Q. Now, had you done -- had you said anything to her in the days previous to have provoked this?

A. No.

Q. Did something happen the next day, April 20th, between Rachel Weston and Mr. Fuentes and you?

A. This inappropriate workplace behavior popped up again. I was sitting in the office with Rachel and Ruben. And Ruben had an index card, a large index card, and he wrote on it and he handed it over to Rachel, who was closest to me; and she held it up, and it said, fuck you, moron.

[p.86]

Q. Did you attempt to talk to any of the supervisors about that?

A. Yes, I did.

Q. Were you successful?

A. No.

Q. Well, now, you need to speak up for the Court.

A. No.

Q. Did you place another phone call to the EEO Office of the VA on or about April 23?

A. I did.

Q. And what did you tell the counselor on the other end of the line?

A. That I felt like this was retaliation for my initial EEO. The harassment, the inappropriate workplace behavior, the gender based remarks had started again.

Q. And what names did you give the EEO Counselor as far as the individuals you thought were committing this discrimination and retaliation?

A. Lori Hagen and Wanda Ibrahim. Wanda Ibrahim because we had been told, Dr. Goulding was out by this time, we had been told if we had any problems or concerns on that kind of level to talk to her, on a more

major level we were to go to Dr. Knight; so basically I considered Wanda my first line supervisor at that point.

Q. Had she been receptive to your complaint?

[p.87]

A. She listened, but I don't know if she did anything.

Q. Now, between April 23, you go through May and then into June, did anything unusual transpire between you and Ms. Hagen that you can think of?

A. I'm trying to recall. Yes, there was one very severe incident, frightened me. I was in the recovery room waiting for a surgeon, an orthopedic surgeon, to come to do a case, it was my assigned case, and I was waiting for him to come because we had to get a permit and take that patient back to the room; and Wanda and Lori came in the room, came in the recovery room and said, let's see if we can't get this horse back in the barn. Wanda got at the head of the patient's bed and Ms. Hagen got at the foot of that patient's bed, and they wheeled him into the operating room under my protest that the surgeon had not finalized the consent and that was illegal.

Q. During this period of time did you discuss you having contacted the EEO Office with any of your coworkers?

A. No. I mentioned it to Ms. Harris because after Ms. Hagen had accosted me about the chest pain, she ran to Carolyn Harris and said, can't you do –

MR. SMITH: Objection, Your Honor, more hearsay.

Q. Well, we can't talk about that, Ms. Roberts. It's just what was going on between you and Ms. Hagen.

A. Okay.

[p.88]

Q. Did you tell Mr. Fuentes that you had filed charges against him?

A. No, sir.

Q. Did you tell Ms. Hagen you had filed charges?

A. No, Sir, I did not.

Q. Did you tell anyone other than Ms. Harris?

A. No.

Q. Now, in -- on or about June 13, did you notice anything unusual in the O.R.?

A. Yes.

Q. And what was that?

A. I walked in on June 13th and went into the nurse's lounge to change clothes; and I said good morning, and people would go (gestures).

Q. Well, describe it for the record

A. They would have a very strong, severe facial expression and turn their head and get up and walk out, and no one would talk to me or communicate with me.

Q. Now, were you aware during that period of time, as of June 13, that the EEO counselor had been contacting Lori Hagen and any other CRNA's about the charges that you had filed?

A. No, sir.

Q. None of them told you they had been contacted by the EEOC?

[p.89]

A. No, sir.

Q. What was the next significant event that occurred with regard to your employment in June, did you get word from Dr. Cancellaro of any kind?

A. On June the 26th Ms. Hagen is --

Q. And who contacted you?

A. On June 26th Ms. Hagen passed me in thc hallway am) threw me a kiss.

Q. Okay. You mean with her hand or just pursed her lips?

A. She went (gestures).

Q. Did she say anything to you?

A. No, and I just went on my way. I was eating an Apple, going down the hall. I was eating an apple. They said, if she starts this stuff, don't -- anyway, I got back to my office late in the afternoon. I had been out on the floor making rounds, and I got back to my office about 3:45 in the afternoon on June 24; and there was a note on my office to contact Martha Potts and Dr. Cancellaro; and I said, hey, Martha, it's Nancy; and she said, Dr. Cancellaro wants to see you and bring a union rep. I said, right now? Well, it's 3:45, let's see if I can find one. I said, what's this about? She said, problems in the O.R.

MR. SMITH: Objection, Your Honor.

THE COURT: I don't believe that's hearsay,

[p.90]

Overruled.

Q. Now, were you able to find a union representative that late?

A. No, sir. No, sir. Everybody was gone.

Q. Did you call the office back and tell them that?

A. Yes, I did.

Q. And you were told to report the next morning at when?

A. Martha said, let me talk to Dr. Cancellaro; and she said, come up in the morning at 7:15 with the union rep; and I said, I have patients assigned. I've got patients to do. Could this possibly wait until the afternoon? She said, just a minute; and she came back and said, no, get up here at 7:15 in the morning promptly; and I said, okay.

Q. You found Mr. Hughes that next morning, Louie Hughes, the union representative?

A. Yes.

Q. He worked at the VA?

A. Yes.

Q. And you went to Dr. Cancellaro's office?

A. Yes, sir; and I was, had taken --

Q. Did you have any documents with you?

A. Yes, sir. I had my EEO complaints in an attache case.

Q. Why did you bring those with you?

A. He said he wanted to talk to me about the problems in

[p.91]

the O.R., and the only thing I had any knowledge of was my EEO) complaints.

Q. At this time what was your awareness with regard to any type of petitions having been circulated against you in the O.R., did you know, had you seen any petitions?

A. No.

Q. Tell the court what Dr. Cancellaro told you when you went into his office.

A. I walked in with my union rep; and he said, I've called you up here because there's been complaints; and I said, I've brought my attache case, would you like -- so we can discuss my EEO charges; and he said, I'm not interested in hearing anything you have to say. You are detailed immediately to the emergency room as a staff nurse. And I said, what? He said, Mary Meeks is waiting on you out in the foyer to escort you straight to the emergency room. And I said, but how can you do that? And he said, I can do anything to anybody any time I want to.

Q. And was that the end of the conversation?

A. Yes, and he -- yes.

Q. Did -- now, Mary Meeks, what was her position in the emergency room?

A. She was nurse manager over the emergency room and a couple of other units.

Q. Did she escort you to the emergency room?

[p.92]

A. Yes, sir, she did right then.

Q. And what was you' emotional state?

A. I was a wreck.

Q. Did you go right to work that day?

A. I reported to the station. She --

Q. Were you able to work?

A. Excuse me. she put -- I'm sorry.

THE COURT: Just take your time.

A. She was a lady. She was very compassionate. She put me in her office. She said, stay here as long as you need; and I cried for three days.

MR. DEVAULT : Your Honor, we would have some other evidence with regard to what impact this had on her, missing social events such as her birthday and so forth. If you want to hear it now, we can put it in now or wait until the -- until, until we have a trial on the damages. I don't know how Your Honor feels about that.

THE COURT: Well, the primary reason why I bifurcated damages is because I had a trial scheduled next week. That trial has now settled. If you want to put it in now, you can put it in now; however, I don't want to put Ms. Smith at a disadvantage because she came not planning to try the damages.

MR. DEVAULT: as long as we can bring that aspect up.

* * *

[p.102]

You pursuing a degree; and this one is also signed by Dr. Anca Pop; is that correct?

A. Yes, sir.

Q. Now, Ms. -- you've been moved out of the GI lab, and why was that? What was -- was it closed down or moved or what was the deal with that?

A. It was, it was relocated to the surgery department.

Q. It was relocated back to the department where those petitions had circulated against you; is that correct?

A. Yes, sir.

Q. So the VA did not move you back with the department, so to speak; did it?

A. No, sir.

Q. And the va administration put you where?

A. In the broncboscopy lab.

Q. And approximately when did the VA do that?

A. It was June of 2005.

Q. Of this past summer?

A. Yes, sir.

Q. Now, have you gotten another evaluation since we made up this witness list and turned all this in yet?

A. No, not yet.

Q. Okay. Now, have, have you had any complaints about your performance or your personality or your ability to get along with people in the bronchoscopy laboratory?

[p.103]

A. Not that any of my supervisors have mentioned.

MR. DEVAULT: If it please the court, at this point in time we would go back and just introduce certain of the exhibits, but they're all -- I know they're all admitted. Does Your Honor want any kind of foundations or remarks about them?

THE COURT: Everything is in except 11 and 12. 23 and 40 are in conditionally.

Q. During the -- during 2001 you received copies of notices from the EEO and copies of investigative summaries and that type of document; did you not?

A. I did.

Q. And such as exhibit 6, this was a -- although addressed to Dr. Carl J. Gerber on February 22, 2001, advising the VA of your charges, this was the copy sent to your home; is that correct?

A. Yes, sir.

Q. So the EEO sent you copies of everything that was going out of your file: is that right?

A. Yes, sir.

Q. And there's also a notice, exhibit number 8, to Dr. Carl Gerber on May 4, 2001, with regard to the fact that your charges at that time that you had called in in April related to Ms. Lori Hagen, the nurse manager; is that correct?

APPENDIX N

EXCERPT FROM THE ARGUMENT SECTION OF THE APPELLANT'S BRIEF

* * *

[p. 41]

ARGUMENT

The VA's Removing Nancy Roberts From Her CRNA Position In The OR Constitutes Title VII Retaliation,

The concerted retaliatory efforts of friends and supporters of Lori Hagen which convinced the VA to remove the plaintiff from her CRNA position within days of their learning that Mrs. Roberts had filed EEO charges against the OR's popular Nurse Manager violated Title VII of the1964 Civil Rights Act, codified at *42 U.S.C.A. §2000e-3.*[21] The Supreme Court's holding in *Burlington Northern & Santa Fe Railway Co. v. White,* 126 S. Ct. 2405, 2412 (2006) speaks directly to the claims in the plaintiff's case:

---

[21] The provisions of *42 U.S.C. §2000e-16* extend the statutory protections against employer discrimination and retaliation to federal agency employees. The application of Title VII to the facts of the case is not at issue.

> . . . . The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.

[p.42]

Even while it was dismissing the plaintiff's Title VII claims, the District Court concluded that the plaintiff's reassignment to the ER, where Mrs. Roberts could not practice her general anesthesia skills, and her subsequent reassignments to the GI Clinical Lab and then to the VA's Bronchoscopy Lab qualified as "adverse employment actions under pre-*Burlington Northern* case law [R. 96, p.6, footnote 4; JA 105].

Certainly the plaintiff's emotional distress and embarrassment, her loss of on-call and overtime pay, and the 85% reduction in practicing her CRNA skills qualify as "material and adverse" under Burlington Northern, 126 S. Ct. 2415. Mrs. Roberts was abruptly removed from her CRNA position, suffered through two VA investigations, and was moved "from pillar to post" to keep her out of the VA's surgical services OR suite. A reasonable employee would be objectively offended and distressed, and completely discouraged from ever filing EEO charges against the VA.

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